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REPORTS

OF

515

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT OF ALABAMA,

DURING

JANUARY TERM AND A PART OF JUNE TERM, 1852.

REPORTED BY

J. W. SHEPHERD.

40580

VOL. XX.

MONTGOMERY:

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1852.

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v.20

OFFICERS OF THE SUPREME COURT,

DURING THE TIME OF THESE DECISIONS.

HON. E. S. DARGAN, CHIEF JUSTICE.

HON. WM. P. CHILTON,
HON. DAVID G. LIGON,*
HON. GEORGE GOLDTHWAITE,†
HON. JOHN D. PHELAN.†
} Associate Justices.

M. A. BALDWIN, ATTORNEY GENERAL.

GEO. C. BALL,
THOS. S. MAYS.
} CLERK.‡

---

*Coleman, J., having resigned *before* the expiration of the term for which he was appointed, Ligon, J., was elected to fill the vacancy, on the 11th of December, 1851.

†By an act of the General Assembly, approved December 20th, 1851, the number of Judges on the Supreme Court Bench was increased to five. Under this act, Justices Goldthwaite and Phelan were elected on the 7th of January, 1852.

‡Mr. Ball resigned the clerkship on the 7th of June, 1852, and Mr. Mays was appointed in his stead.

ERRATA.

In McGehee v. Gindrat, page 95, tenth line of second head note, for "*execution satisfied*" read "*return set aside.*"

In McLemore v. Mabson et al., page 137, instead of "*J. & J. Williams*" for plaintiff in error, read "*T. & J. Williams.*"

In Brown v. Branch Bank at Montgomery, page 425, last line, for "*concurs*" read "*I concur.*"

In Langdon et al. v. Raiford, page 532, first head note, for "*execution*" read "*attachment.*"

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REPORTS

OF

CASES ARGUED AND DETERMINED

AT JANUARY TERM, 1852.

DRINKARD *vs.* THE STATE.

1. When an indictment is withdrawn from the docket, "on motion of the solicitor, the leave of the court being first had, with permission to reinstate it if necessary," and no other step is taken in the case for more than two years afterwards, the cause is discontinued.

ERROR to the Circuit Court of Chambers.
Tried before the Hon. E. Pickens.

RICE, for plaintiff in error.

1. A prosecution by indictment is a suit in which the State is plaintiff, and the accused is the defendant. If such suit was not commenced before the indictment was found, the finding of the indictment and its return into the court by the grand jury is the commencement of the suit, whether a capias issues or not; or whether the capias issued is returned executed or not executed.

The *mere neglect* of the clerk to docket it cannot operate a discontinuance of such suit. Nor can the mere neglect or mere passiveness of any officer produce such a result. But where the solicitor, by leave of the court, actually interferes with its pendency on the docket, and its progress, and takes it off the docket, withdraws it, and files it, and keeps it off

the docket for more than a term, such *active and unlawful interference* amounts in law to a discontinuance or abandonment of the prosecution. Clay's Dig. 460, § 2.

2. The rights of a defendant in a civil case cannot be greater than those of a defendant in a criminal case. Nor can the State, in a prosecution by indictment, claim *an exemption* from the consequences of its own unlawful interference with the progress of the suit, in any case where a plaintiff in a civil suit could not claim like exemption. The State, in this respect, possesses no exclusive privileges; and wherever the interference of a plaintiff in a civil suit would be construed as working a discontinuance or abandonment of his suit, the like interference by the State, by leave of the court, with its own prosecution, will be deemed a discontinuance or abandonment of the prosecution. Suppose a plaintiff in a civil suit had actually done with his suit what the solicitor by leave of court did with this indictment, would it not have been a clear case of discontinuance or abandonment of the suit? 6 Comyn's Dig. marginal page 266 (W. 1); Clay's Dig. 342, § 162, which shows that those causes only "*remaining on the docket* of any court *at the rising thereof*, shall be continued over *for trial at the next succeeding term.*" Of course, those causes which are *taken off the docket* are discontinued.—Kennon v. Bell, Minor's Rep. 98; State v. Blackwell, 9 Ala. Rep. 79.

Ashlock v. Commonwealth, 7 B. Monroe, 44, may be correct in Kentucky, where they have no such statutes as ours bearing on the subject; but it is insisted that it is not the law here. It will not do to admit the power in a solicitor by leave of court to withdraw a case from the docket "*with leave to reinstate it if necessary.*" If this power exists in one criminal case, it exists in all; and indictments for the highest offences may be kept in this state of "suspended animation" for many years, until the witnesses for the defence have all died, and then reinstated, greatly to the subversion of justice, and the oppression of the innocent. The statute of limitations in such cases ceases to be a statute of repose.

Discontinuance is good ground for reversal. Givens v. Robbins & Pointer, 5 Ala. Rep. 676.

It could not have been pleaded to the indictment, nor was it necessary to plead it; it comes up on the record.

The entry of a *nolle prosequi* is "*a discharge as to the indictment.*" This was the *decision* of all the judges, except the chief justice (Holt) who *intimated* a different opinion, in Goddard v. Smith, 1 Salkeld, 21; Commonwealth v. Wheeler, 2 Mass. Rep. 172; State v. Blackwell, 9 Ala. Rep. 79.

The effect of a *nolle prosequi* or discontinuance in a criminal case cannot be cured by any thing occurring afterwards, because it is "*a discharge of the indictment,*" and there is no statute of jeofails as to proceedings in criminal cases.

The case cited from 7 B. Monroe shows that a *nolle prosequi* entered, with *express leave of court to reinstate*, may not be attended with such an effect; but the leave of *court* to reinstate cannot alter the effect, unless the *defendant agrees* at the time of the *nolle prosequi*, that the indictment may be reinstated, and therefore the case in 7 B. Monroe is, to this extent, not the law of Alabama.

The whole policy of our State and the nature of our institutions demonstrate, that it never was the design of the legislative tribunals to invest or arm a solicitor or a court with the power to file an indictment, and keep it off the docket at their mere pleasure, and to reinstate and try it when it suited their whim or caprice. "A *speedy* public trial" is expressly guaranteed by the tenth section of our bill of rights, and this right is inconsistent with this *filing* right claimed for the State. If the State can file and then reinstate, at pleasure, when or how can *the defendant* get the case back on the docket, if the court and solicitor do not wish it back, or are not ready to put it back?

M. A. Baldwin, Attorney General, for the State.

1. By the common law, the Attorney General alone had the power to discharge an indictment, without acquittal, and this was by *nolle prosequi;* and in that even he might issue *other process upon the same indictment.* Com. v. Wheeler, 2 Mass. 174; The State v. Fleming, 7 Humph. 152; The State v. McNeil, 3 Hawks, 183; Goddard v. Smith, 6 Mod. Rep. [261]; 4 Com. Dig. Indictment (K), 698; 1 Chitty Cr. Law, 480; 1 Salk. 21; The State v. Thomson, 3 Hawks, 613.

2. But admit that a *nolle prosequi* once entered bars any other *proceeding on the same indictment.* No prosecuting attorney has the right to enter a *nolle prosequi*, or otherwise discontinue an indictment, except by leave of the court. Clay's Dig. 460, § 2. Before a *nolle prosequi* or a discontinuance can be pleaded by a defendant, must not the record show that a *nolle prosequi*, or "a declaration that the State will proceed no further," and that by the consent of the court, was entered? Without this, the indictment is not discontinued, and the indictment stood continued by operation of law. The clerk should have placed it upon the docket, as "*leave to withdraw and file*," by consent of court, was not leave to enter a *nolle prosequi.* The failure of clerk to place the indictment upon the docket did not amount to a discontinuance. Wiswall v. Gliddon, 4 Ala. Rep. 358.

3. "Leave to file" was "leave to place away among the papers of the office, and contained a reservation to reinstate. Brow v. The State, 7 Humph. 156; Ashlock v. The State, 7 B. Monroe, 44.

4. The motion to strike the case from the docket was properly overruled. The defence did not pursue the proper mode to accomplish their object. It should *have been pleaded in bar to the indictment.*

A paper found among the files of the court proves itself. State v. Clarkson, 3 Ala. Rep. 378. By not pleading the facts specially it was waived, as the plea of not guilty admitted the indictment te be genuine.—Judge Co. Court of Pike Co. v. Wilson, 18 Ala. Rep. 758–9.

DARGAN, C. J.—The plaintiff in error was indicted at the Spring Term, 1847, of the Circuit Court of Chambers, for gaming. Two writs of capias were issued against him, both of which were returned, "not found." At the Spring Term, 1848, the following entry was made upon the record: "Upon motion of the solicitor, leave of the court being first had, this case is withdrawn from the docket, with leave to reinstate if necessary." No further step was taken to bring the defendant into court until January, 1851, when, upon the order of the solicitor, a capias was issued, and the defendant arrested. At the trial the defendant moved the court to

strike the cause from the docket, on the ground that it had been discontinued; but his motion was overruled, and he excepted. The overruling of this motion is now assigned as error.

All the authorities agree that every suit, whether civil or criminal, may be discontinued. Hawkins' Pleas of the Crown, Vol. 2, 416; Chitty's Criminal Law, 364; and a discontinuance may be defined to be a gap or *chasm* in the proceeding, occurring after the suit is pending. Chitty's Criminal Law, Vol. 1, 364; Hawkins' Pleas of the Crown, Vol. 2, 416; Black. Vol. 3, 296. If we test this case by these rules, it appears to me it is impossible to say there has not been a discontinuance of the suit, for it was pending from the time the indictment was returned into court by the grand jury, and there has been a chasm in the process of more than two years, and this chasm was produced by the joint act of the solicitor and the court, or rather by the act of the solicitor with the approbation of the court. If this be not a discontinuance, then I say that there is no such thing as a discontinuance known to our law. I would not hold that the mere failure to issue process would be a discontinuance; because the issuing of process upon an indictment is made the duty of the clerk by our law, and he being a mere ministerial officer, the defendant ought not to be allowed to take advantage of his omissions to perform his duty; but when the cause is taken from the docket by the solicitor, with the permission of the court, and no process is issued thereon for more than two years, it must be discontinued, if by law a criminal case can be discontinued by failing to prosecute it regularly.

It is, however, insisted by the attorney general that the practice of taking indictments off the docket, and declining to issue process on them for a time, has been sanctioned by the Circuit Courts, for a considerable time, and has been found beneficial in the administration of the criminal law. This may be true, but I can find no warrant for such a practice in the common law, and I am certain in my own mind that our statute law gives none. The second section of the eleventh chapter of the Penal Code provides that it shall not be lawful for the attorney general, solicitor, or other prosecuting officer to enter a *nolle prosequi* on any indictment, or in any other way

to discontinue or abandon the same, without the leave of the court having jurisdiction to try the offence being first had and entered on its minutes. Clay's Dig. 460–461. But I can draw no other inference from this act than this; the attorney general or solicitor, who before its passage had the exclusive control of all prosecutions, and could enter a *nolle prosequi* or discontinue a prosecution, as he saw fit, must, since the passage of the act, obtain the consent of the court before he can do either. But when the one or the other is done with the consent of the court, that is, when there has been a *nolle prosequi* entered, or the prosecution discontinued, the same consequences follow which would have resulted from a discontinuance or a *nolle prosequi* before the passage of the act.

It is also urged that this practice has obtained in Kentucky, and we are referred to the case of the Commonwealth v. Ashlock, 7 B. Monroe, 44. I admit that this case fully sustains the practice pursued by the Circuit Court in this case; but on what authority, or in accordance with what rule, the courts of Kentucky proceed, I know not. If it be in pursuance of a statute of their own, then their decision is correct; but if they profess to proceed according to the practice of the common law of England, then their decision is incorrect; for the common law gives no countenance to such a practice. Indeed, the Court of Appeals of Kentucky admit that the case would have been discontinued *if leave had not been obtained* to commence again at the time permission was granted to suspend further proceedings; but I am at a loss to know how leave to commence the prosecution afresh, by issuing new process, can prevent the actual chasm in the prosecution, resulting from the omission to prosecute, unless it be declared by the legislative will that such a chasm shall not produce a discontinuance. I therefore infer that the courts of Kentucky are governed by statute law, or if they are not, then I must say that their decision is erroneous, and I cannot follow it. That it would be well for the legislature to adopt such a practice by enactment, I have no doubt; but the court, which is guided by rules as well in practice as in determining upon the guilt or innocence of the accused, cannot. We must be governed by the rules of law, as they exist. We have not the power to introduce new laws, on the ground that they are

more convenient than the old, or that they would better subserve the purposes of justice.

The ruling of the Circuit Court was erroneous, and the judgment must be reversed.

SEABORN AND JIM *vs.* THE STATE.

1. A slave may be convicted of murder for the homicide of another slave.
2. The statute requiring that not more than twenty, nor less than ten days, shall elapse between the time of sentence and execution, is directory merely; and if more than twenty days are allowed, the judgment of conviction is not thereby vitiated.
3. A slave's voluntary confessions of guilt are admissible evidence against him. The facts that he is a slave, and ignorant, and to some extent unacquainted with the consequences which may attend the making of such confessions, do not affect the admissibility of the evidence, but should be considered by the jury, in connection with the admissions, in ascertaining the weight to be given to them.

ERROR to the Circuit Court of Macon.
Tried before the Hon. E. Pickens.

The plaintiffs in error, who were slaves, were indicted for the murder of another slave. They demurred to the indictment, and their demurrer being overruled, they pleaded "not guilty." The committing magistrate was examined as a witness on the part of the State; and he testified, "that when he reached the place where the examination took place, there were several gentlemen there; that the two prisoners were sitting down, each chained with a padlock around his neck, and that they looked quite melancholy; that the owner of the prisoners and the owner of the deceased were present, and that there was a gun and a stick in the company; that the witness said to the prisoners, 'that it was a bad business, or a bad situation, they were in;' that Seaborn replied 'yes, it was; but that it was too late,' and shook his head; that in about ten minutes after this conversation, witness proceeded to the examination, and sent the prisoner Jim, with two men, one of whom had a gun, out of the hearing of the examina-

tion, and let the prisoner Seaborn remain; witness then asked Seaborn if he was guilty, or not guilty, and Seaborn replied that 'he was guilty;' witness then asked him to state how the killing occurred, and he replied," &c., detailing the circumstances of the murder. The prisoner Jim was afterwards examined apart from Seaborn, and his confession corroborated Seaborn's in every particular. The State also produced other proof corroborating the confessions of the prisoners, as to the place and manner of the killing. The counsel for the prisoners asked the court to exclude their confessions from the jury, but their motion was overruled, and they excepted. There was a verdict of "guilty" against both of the prisoners, and they were sentenced to be executed on the 19th December, 1851, which was about two months after their conviction.

James E. Belser, for plaintiffs in error:

1. The demurrer to each count of the indictment should have been sustained. The Penal Code has abolished the trial of a slave for murder according to the common law; and it is doubtful whether it has provided for such a trial in any of its provisions.—Clay's Dig. p. 472, §§ 1, 2 and 7.

2. The sentence of the court, on the 19th December, 1851, is illegal and void.—Clay's Dig. p. 475, § 16; ib. 438, § 1.

3. The confessions of the prisoners should not have been received. They were made under such circumstances, as were sufficient to exclude them.—State v. Clarissa, 11 Ala. Rep. 61, 62; State v. Phelps, 11 Verm. 116.

4. The confessions were made before the owner of the slave, and also a magistrate, without giving to the prisoners any warning, and they should be held bad on this ground.—Roscoe on Ev. 43.

5. The court should keep it in mind, that the plaintiffs in error here are slaves, and not white persons, and that the same rules on the subject of confessions should not be strictly applied to the former, that are to the latter.

M. A. Baldwin, Attorney General, for the State.

1. To exclude confessions of guilt, there must appear to have been held out *some fear of personal injury*, or some hope of personal benefit. In this case there was neither.—The

State v. Guild, 5 Halst. 182; 1 Greenl. Ev. 265 and 266; 10 Pick. 490; Hawkins v. The State, 9 Mo. 190; Wharton Cr. Law, 186; Roscoe, 40; State v. Potter, 18 Conn. 166.

2. An examination by a magistrate by questions and answers is held good, if free from promises and threats.—Rex v. Ellis, Ryan & Moody, 432; The State v. Freeman, 1 Spears, 57.

3. It is no objection to confessions properly obtained, that the party charged is in jail, or otherwise legally confined.—Com. v. Mosler, 4 Barr, 264; 2 Car. & P. 418; 1 Wheeler Cr. Cas. 392.

4. A confession, though extorted, may be received, where many circumstances are in proof which agree with the several disclosures.—1 Greenl. Ev. 267; State v. Moore, 1 Hayw. 482; Hudson v. State, 9 Yerger, 410.

5. Questions which are calculated to entrap, or which assume the guilt of the prisoner, are inadmissible, and on this rule the decision in the Clarissa case (11 Ala. Rep.) is founded.—Com. v. Mosler, 4 Barr, 265.

CHILTON, J.—1. The demurrer to this indictment was properly overruled, and the ground upon which it is questioned, namely, that a slave cannot be convicted of murder for killing a slave, is opposed to the statute, which declares that every slave who shall be guilty of murder, &c., shall suffer death.—Clay's Dig. 472, § 2. That murder may be committed in the homicide of a slave, is not questioned; and here the general term, "murder," is used without regard to whether the person murdered was a freeman or slave.

2. That the sentence was to be executed after the expiration of twenty days from the time of their conviction, does not vitiate the judgment. The statute requiring that not more than twenty nor less than ten days shall elapse, between the time of sentence and the execution, is clearly directory.—Dig. 474, § 16.

3. I have looked into the books with much care, to see if there was any principle or precedent which would justify the court in holding the confessions of these slaves inadmissible as evidence; but I have been unable to find either.

The facts that they were slaves, and ignorant, and to some

extent unacquainted with the consequences which may attend the making such admissions, go not to the admissibility of the evidence, but should be weighed by the jury in connection with the admissions in ascertaining the weight to be given them.

Upon a careful examination of this record, it is impossible to resist the conclusion that the admissions of guilt of each of the prisoners were voluntarily made, and it is equally clear from the corroborative proof, that the admissions were true. That they were made to the examining magistrate, who did not previously caution them, as he undoubtedly ought to have done, as to the effect of such admissions, would not justify the court in excluding them. We find no case excluding confessions for want of such caution. The question in such cases is, were the confessions voluntary, and uninfluenced by fear of personal injury or the hope of some benefit.

We do not agree that the remark made to the prisoners by the justice, "that it was a bad business or a bad situation they were in," was such as assumed their guilt, and rendered their subsequent confessions improper. He doubtless alluded to their being in custody upon the charge, and his remark was rather expressive of sympathy for their unfortunate condition, than as eliciting any response inculpating the prisoners. The facts of this case are wholly unlike the facts in Clarissa v. The State, 11 Ala. Rep. 61.

The court are unanimous in holding the evidence admissible, and that the conviction is entirely regular, as shown by the record.

The judgment is therefore affirmed; and as the sentence of conviction has been suspended that the case might be here reviewed, it is adjudged that the prisoners be executed on Friday the second day of April next, between the hours of 10 o'clock A. M. and 4 o'clock P. M., of that day, by being hanged by the neck until they are dead.

THE STATE EX REL. SAVARY *vs.* CAROLINE, A SLAVE, ET ALS.

1. Exclusive power over the importation of slaves is vested in Congress after the first day of January, 1808, by the ninth section of the first article of the Constitution of the United States.
2. The State courts could at no time exercise any jurisdiction in cases of violation of the laws prohibiting the slave trade, except such as were authorized by the Congress of the United States; and all jurisdiction is now taken away from them, by the fourth section of the act of Congress, approved March 3, 1819.
3. When a court has no jurisdiction over the subject matter of a suit, neither the express nor the implied consent of the parties will confer it.

ERROR to the Circuit Court of Talladega.
Tried before the Hon. E. Pickens.

LIBEL to forfeit slaves brought into Alabama from the Republic of Texas.

The relator alleges that the slaves named and particularly described in the libel were brought into this State from the Republic of Texas, contrary to the act of Congress for the suppression of the slave trade, and prays that they may be declared forfeited, and sold for the benefit of the State and himself.

George S. Ragland and Reese Howell, in whose possession the slaves were, and who claimed absolute property in them at the time the libel was exhibited, came in as respondents, and assigned reasons against the decree of forfeiture and sale prayed for. There were demurrers and replication in the pleadings in the court below, which it is not necessary to state particularly. The Circuit Court dismissed the libel; and its action on the relator's demurrer, and in decreeing a dismissal, and adjudging costs against the relator, are here assigned for error.

L. E. PARSONS, for plaintiff in error.

RICE & MORGAN, *contra:*

LIGON, J.—The first question to be disposed of in this

case is, had the Circuit Court jurisdiction of the subject matter of the controversy, and power to hear and determine the case presented in the libel of the relator? Should it appear that this jurisdiction is wanting, an examination of the errors assigned will become useless and unnecessary.

The State courts are dependent, for all their jurisdiction on the subjects involved in this controversy, upon the legislative action of the Congress of the United States, and upon that of the several States for the form of proceeding to call into action and carry out the jurisdiction thus conferred by Congress.

By the ninth section of the first article of the Constitution of the United States, it is provided, that "The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person." Under this provision of the Constitution, power over the slave trade, then carried on extensively and profitably by the most commercial States of the Confederacy, was conferred on Congress, but not to be exercised for prohibitory purposes prior to the year 1808.

On the 2d of March, 1807, the Congress of the United States passed an act, entitled, "An act to prohibit the importation of slaves into any port or place within the jurisdiction of the United States, from and after the first day of January, 1808." The first section of this act provides, "That from and after the 1st day of January, 1808, it shall not be lawful to import or bring into the United States or the territories thereof, from any foreign kingdom, place, or country, any negro, mulatto, or person of color, with intent to hold, sell, or dispose of such negro, mulatto, or person of color, as a slave, or to be held to service or labor."—U. S. Stat. at large, vol. 2, 426. The second section of this act declares, that the vessel in which such persons are brought shall be forfeited. The fourth section, after providing certain penalties and forfeitures against the importation of "slaves, mulattoes, and persons of color," for the purposes prohibited in the first section, proceeds: "And neither the importer, nor any person or per-

sons claiming from or under him, shall hold any right or title whatsoever, to any negro, mulatto, or person of color, nor to the service or labor thereof, who may be imported or brought within the United States, or territories thereof, in violation of this law; but the same shall remain subject to any regulations not contravening the provisions of this act, which the legislatures of the several States or Territories at any time hereafter may make, for the disposing of any such negro, mulatto, or person of color."

Here, power is given to the legislatures of the States and Territories to confer jurisdiction on such courts within their respective limits, as they may designate, and to prescribe the manner in which this jurisdiction shall be called into action and exercised, as well as to provide what disposition should be made of the "negro, mulatto, or person of color," thus brought within their respective limits, contrary to law;—wisely and prudently respecting the local institutions of the several States and Territories, and leaving it to them to assign to the class of persons thus unlawfully thrown upon them, the social station most consistent with those institutions.

Under the authority of this provision of the act of March 2d, 1807, the legislature of the Mississippi Territory, then exercising lawful jurisdiction over the territory which now forms the State of Alabama, passed an act in the year 1815 declaring, that, "Any slave or slaves, brought or imported into this Territory, contrary to the laws of the United States, in such case made and provided, shall be condemned by any superior court of this Territory, within whose jurisdiction the said slave or slaves shall be brought or be seized, upon libel filed in the said court; and shall be sold by the proper officer of the court to the highest bidder, at public auction, for ready money, after advertising the time and place of such sale, in some newspaper in the Territory, at least fifteen days previous thereto."—Clay's Dig. 547, § 1. This statute remained unaltered, and was in force in the "Alabama Territory," at, and after its separate organization in 1817, and was adopted by the legislature of the State, after its admission into the Union in the year 1819; and so the law remained until the year 1823, when the manner of proceeding to condemn and

sell such slaves was materially altered, and a general agent was required to be appointed by the Governor, to prosecute the libel in such cases, and dispose of the slaves, when condemned.—Clay's Dig. 547–'48, §§ 3, 4, 5, 6, 7, 8, 9, 10. It is not necessary, in this case, for us to determine how far and to what extent the act of 1823 would affect the proceedings in the court below, which were evidently intended to be conformed to the act of 1815, as we are fully persuaded the legislation of Congress on the subject has put an end to the jurisdiction of the State courts in all such cases.

By the fourth section of an act of Congress, approved 3d March, 1819, entitled "An act in addition to the acts prohibiting the slave trade," it is enacted "that when any citizen or other person shall lodge information with the attorney for the district of any State or Territory, as the case may be, that any negro, mulatto, or person of color has been imported therein contrary to the provisions of the acts in such case made and provided, it shall be the duty of said attorney forthwith to commence a prosecution by information; and process shall issue against the person charged with holding such negro, negroes, mulatto, mulattoes, person or persons of color, so alleged to be imported contrary to the provisions of the acts aforesaid; and if, upon the return of the process executed, it shall be ascertained by the verdict of the jury that such negro, negroes, mulatto, mulattoes, person or persons of color, have been brought in, contrary to the true intent and meaning of the acts in such cases made and provided, then the court shall direct the marshal of said district to take the said negroes, mulattoes and persons of color into his custody for safe keeping, subject to the orders of the President of the United States; and the informer or informers, who shall have lodged the information, shall be entitled to receive, over and above the portion of the penalties accruing to him or them by the provisions of the acts in such cases made and provided, a bounty of fifty dollars for each and every negro, mulatto, or person of color, who shall have been delivered into the custody of the marshal; and the Secretary of the Treasury is hereby authorized and required to pay, or cause to be paid, the aforesaid bounty, upon the certificate of the clerk of the court for the district where the prosecution may be had, with the

seal of the office thereto annexed, stating the number of negroes, mulattoes or persons of color so delivered."

The sixth section repeals all acts and parts of acts "repugnant to the provisions of this act."

The provisions of this act are, in our opinion, utterly inconsistent and repugnant to those provisions in the acts of 2d of March, 1807, and 20th of April, 1818, which are substantially the same, so far as they confer power on the States and Territories to bestow jurisdiction on their own courts to proceed by libel or information for the condemnation and sale of negroes, mulattoes and persons of color imported, or brought into them contrary to the acts of Congress, and being repugnant, the former, to the extent of such repugnance, are repealed.

According to the act of 1819, all power over the subject is conferred on the District Courts of the United States, their attorneys and marshals; and the power of disposing of the persons unlawfully imported is taken from the States, and conferred on the President of the United States. Nothing is left to the former but their useless statutes, passed to carry out the act of 1807.

Congress having, by this means, revoked the authority given to the States and their courts, the jurisdiction of these courts falls also.

But it may be said that as no exception was taken by the respondents in the court below to its jurisdiction, it cannot be urged in the Appellate Court; and that by responding in that court, and pleading, they have consented to the jurisdiction. To this it is replied, that when a court has no jurisdiction over the subject matter of a suit, neither the express nor implied consent of the parties will confer it. In Wyatt v. Judge et al., 7 Por. 37, it is said, and we think rightly, "that an objection to the want of jurisdiction was allowable in the Appellate Court, though not made in the court below." Suppose we were to reverse the judgment on the assignment of errors in the record, we could not remand the cause to a court that could render no judgment upon the matters in controversy.

The judgment of the Circuit Court is affirmed.

SPENCER *vs.* THE STATE.

1. A declaration, of a character proper for a slave to make, made by him in the presence and hearing of a white person from whom it naturally called for a response, is admissible evidence against such white person, if uncontradicted by him, as showing acquiescence in the truth of the statement.
2. The eighteenth section of the fourth chapter of the Penal Code, (Clay's Digest, 419, § 18,) has not an extra-territorial operation.
3. The terms "steal" and "larceny," as used in the twenty-fifth section of the fourth chapter of the Penal Code, (Clay's Digest, 420, § 25,) are technical, and do not include an offence which would not amount to a larceny if committed in this State.

ERROR to the Circuit Court of Macon.

Tried before the Hon. E. Pickens.

The plaintiff in error was indicted for "inveigling, stealing, carrying and enticing away a slave, with a view to convert such slave to his own use," &c. On the trial, the State offered to prove the confessions and declarations of the slave, made the day after the prisoner's arrest, and in his presence and hearing, and after the slave had been taken aside by some of the company present, and privately conversed with. These declarations were offered in connection with other evidence, showing that on the declarations being made, some person present asked the prisoner if he did not intend to whip the slave for making them, to which he replied that "he did." The evidence was objected to by the prisoner, but was admitted by the court. The State also offered to prove other declarations made by the slave in the presence and hearing of the prisoner, after an investigation had been had before a magistrate, and while the prisoner was being conveyed to jail in the custody of the sheriff, which declarations were not contradicted by the prisoner. These declarations were also admitted against the objection of the prisoner. There was also evidence tending to show that the slave had run away from his overseer when about to be whipped by him, in the State of Georgia.

The court charged the jury, "that a runaway slave, either in this State, which slave was run away from a foreign State

and found in this, or found in a foreign State, and belonging to a non-resident, was the subject of the statutory offence of inveigling, stealing, &c., and that under either of the above state of facts, the prisoner could be considered under the indictment." The admission of the declarations of the slave, and the charge of the court, are now assigned for error.

GUNN, for plaintiff in error:

1. Declarations and conversations in presence and hearing of a party, when uncontradicted by him, before they can be received as evidence against him, must be made by such persons and under such circumstances as naturally to call for a contradiction. 1 Greenleaf, § 199; 1 Lit. Sel., Cas. 145; Commonwealth v. Kennedy, 12 Met., 235. Such declarations may often be impertinent, and best rebuked by silence. Child v. Grace, 2 C. & P., 193.

2. Declarations coming from a slave do not come from such a source as to call for a contradiction or reply. Groning v. Devana, 2 Bailey, 192; 1 M'Cord, 430; Fox v. Lambson, 3 Hals., 275; Brown v. Lester, Geo. Dec., part 1, 77; 2 vol. Phillips Evidence, p. 59, note 46, and cases there cited.

3. The court erred in charging the jury that a slave in a foreign State was the subject of the statutory offence of inveigling, stealing, &c., as the 25th § Clay's Dig., 420, only uses the words *steal* and *larceny*. The indictment was found under the provisions of the 25th, and not the 18th section. The proper charge, therefore, for the court to give was, that to make out an offence under the 25th section, the slave should have been taken under such circumstances as would have been a *larceny at common law*. Hawkins v. The State, 8 Porter, 461; and Wisdom's case, Ib., 511; Mooney v. The State, 8 A. R., 328; Murry v. The State, 18 A. R., 727.

M. A. BALDWIN, Attorney General, for the State:

1. Where declarations are made in the presence of a party, which jeopardize his interest or reputation, and not denied by him, it is an admission of the truth of such declarations by the party whose interest or reputation is affected by them. The true rule, in such cases, seems to be that evidence of this

character is admissible, whenever *the occasion and the attendant circumstances* call for serious admission or denial on his part. Vail v. Strong, 10 Verm., 463; Mattocks v. Lyman, 16 Ib., 119; Wheat v. Croom, 7 A. R., 349.

2. In the case at bar, the prisoner was asked if he did not intend to whip the slave for making these statements in his presence, and he replied that he would whip the slave. This will let in the declaration of the slave, for if the party in whose presence, and against whom, the declarations are made, make any answer or reply whatever, the whole conversation in which the declarations are made must be submitted to the jury. Mattock v. Lyman et al., Supra.; Wheat v. Croom, Supra.

3. It is no objection to the admission of these declarations that the declarant was a slave. The reason for their admission is not upon the ground that the party making them could be a competent witness, but they are received upon the ground that they are "verbal acts" connected with the transaction, and calculated to elucidate its character. Rex v. Bartlett, 7 Car. & Payne, 832; Rex v. Smithers, 5 Ib., 332; The State v. Chittem, 2 Dev., 49; Yeatman & Armstead v. Hart, 6 Humph., 375.

4. The charge of the court is in accordance with the recent decisions of this court. The State v. Williams, 15 A. R., 259; The State v. Murray, 18 Ib., 727.

5. The bill of exceptions does not disclose what these declarations were which the slave made in presence of prisoner, and as such, it does not appear that the prisoner was prejudiced by their admission.

6. The cases in 5th and 7th Car. & Payne, Supra., 332 and 832, show that the parties against whom the declarations were made, were both under arrest. Roscoe, Cri. Ev., top p, 46.

GOLDTHWAITE, J.—The first question presented by the record arises upon the admissibility of the declarations of the slave, made in the presence and hearing of the prisoner. The record does not inform us of the character of the declarations, and assuming for the present that they were not denied by the prisoner, and that his situation at the time was not such as to render it improper for him to make such denial, the

question which the court is called upon to determine is, simply whether the admission of a white man to the truth of any statement made by a slave, in his presence and hearing, can be inferred from his silence. The rule in relation to evidence of this character, so far as we are able to deduce it from adjudged cases and the best elementary writers, is, that the statement must be heard and understood by the party affected by it; that the truth of the facts embraced in it must be within his knowledge, and that the statement must be made under such circumstances and by such persons as naturally to call for a reply. 1 M. & M., 306; 14 S. & R., 393; Child v. Grace, 2 C. & P., 193; Hayslep v. Gymer, 1 Ad. & El., 162, 165; Batturs v. Sellers, 5 Har. & J., 117, 119; Cow. & Hill's notes to Phil. Ev. Part 1, 191 to 199; 1 Green. Ev., § 199; Com. v. Kinney, 12 Met., 235.

To reject the evidence in the case under consideration, solely on the ground that the party making the declaration was a slave, would be in effect to decide that, under no conceivable circumstances, could a statement made by a slave call for a response from a white man; a proposition in direct opposition to our daily observation and experience,

That the declaration was made by a person whose condition rendered him incompetent as a witness, does not in the slightest degree affect the principle on which evidence of this character rests. If the declaration was made by a slave, and the party affected by it had made by his reply a direct admission of its truth, there could be no doubt of the admissibility of the statement and reply; and in cases of implied admissions, the admission, instead of being made by language, is made by the silence of the party. The circumstances under which the declarations were made, the fact that the slave, before making them, had been taken aside and privately talked to by some of the company, cannot, in our opinion, in the slightest degree affect the question of the admissibility of the evidence, although it might properly have the effect of impairing its force with the jury. In relation to the reply in the affirmative, made by the prisoner to the question asked by some one present, if he did not intend to chastise the slave for making the declarations, we do not think it amounted to a denial of the statement made, and could therefore have no

bearing upon the question of the admissibility of the evidence. Neither does the fact, that the declarations were made while the party affected by them was under arrest, affect their admissibility. Evidence of the implied admissions of parties while in the custody of officers, under circumstances similar to the present case, has been received by the English courts, Rex v. Smithers, 5 C. & P., 332; and no case has been cited by counsel, and we have been able to find none, in which evidence of this character has been rejected on this ground alone, without the intervention of some other circumstances operating on the mind of the prisoner by fear, by doubts of his rights, or by inducing the belief that his security would be best promoted by silence. No circumstance sufficient to raise this presumption appeared in the case under consideration, and it follows that there was no error shown by the record in the admission of the testimony objected to.

The language of the charge, as stated in the bill of exceptions, renders it difficult to ascertain with accuracy the precise idea intended to be conveyed to the jury. The evidence, however, which is stated in connection with it, and upon which we must presume it was predicated, tended to prove that the slave had run away in the State of Georgia, and the charge in substance was, that a slave in another State, and belonging to a non-resident, could be the subject of the statutory offence declared by the eighteenth section of chapter 4 of the Penal Code, Clay's Dig., 419. In our view, the charge would seem to give to that section an extra-territorial operation, and in that aspect it was clearly erroneous.

And if the court intended to instruct the jury that the prisoner, by bringing into this State a slave taken by him in another State under *any* of the circumstances which would have been a violation of the section of the Penal Code before referred to had the taking been in this State, could be convicted on the indictment against him, we think the charge was also erroneous. The twenty-fifth section of the Penal Code, chapter 4, Clay's Dig., 420, provides "that every person, who shall fraudulently or feloniously steal the property of another in any other State or country, and shall bring the same within this State, may be convicted and punished in every such case as if such larceny had been committed in this State; and

in every such case, such larceny may be charged to have been committed in any county in or through which such stolen property may have been brought," and the previous decisions of this court, based upon the two sections, the eighteenth and twenty-fifth, taken in connection with each other, have established the rule that for a violation of the last section, in relation to a slave stolen in another State and brought into this, that the indictment must be framed on the eighteenth section. William v. The State, 15 Ala., 259; Ham v. The State, 17 Ala., 188; Murray v. The State, 18 Ala. Rep., 727.

It is unnecessary to review the correctness of these decisions upon this point, as we all agree, that whatever may be the form of the indictment required to reach offences under the twenty-fifth section, it can make no difference in the facts necessary to be proved to establish the guilt of the accused under that section. Applying the legal rules of construction to the section last referred to, we entertain no doubt that the words "steal" and "larceny" are there technically used, and that one of the essential ingredients of the offence intended to be created by that section, was the taking of the property in another State, under such circumstances as would constitute larceny in this. Murray v. The State, 18 Ala., 727.

The eighteenth section, however, while it embraces the stealing of slaves within the meaning in which the words "steal" and "larceny" are used in the twenty-fifth section, also embraces other offences, of the same character it is true, and visited upon conviction with the same punishment, but which differ from that offence, considering it as a technical stealing, in some essential particulars. Thus, to carry or entice away a slave in this State, with the view to enable such slave to reach a State or country where he might enjoy his freedom, would be a violation of the eighteenth section; but if the same act with the same intent was committed in another State, and the slave brought into this, it could not, under the view we have taken, be held as a violation of the twenty-fifth section. As the instructions, in the view in which we have last considered them, may have induced the jury to believe that the term stealing, as used in the twenty-fifth section of the Penal Code, covered all the acts embraced by the eighteenth section, and thus tended to mislead them, it follows that the judgment must be

reversed, and the cause remanded; and the clerk of this court will issue a *mandate* to the sheriff of Macon county, reciting the judgment of this court, and directing him to demand the prisoner of the warden of the penitentiary, and requiring the warden to deliver the prisoner to such sheriff, upon being furnished with a copy of said mandate and a receipt endorsed thereon acknowledging such delivery, and commanding such sheriff to transfer the prisoner to the jail of his county for safe keeping, until discharged by law.

SWALLOW *vs.* THE STATE.

1. The offence of gaming is complete by playing once.
2. An unoccupied store house, situated in a town, and fronting on the street, if habitually resorted to by persons for the purpose of playing cards, comes within the provision of the statute against playing cards at any "out house where people resort."
3. A charge to the jury in a criminal case "that if any one or more of their number differed from the majority of the panel as to the guilt or innocence of the defendant, they might properly waive their convictions and agree with the majority, but were not bound to do so," is calculated to mislead the jury, and is therefore erroneous.

ERROR to the Circuit Court of Pickens.

Tried before the Hon. Turner Reavis.

The plaintiff in error was indicted for playing at cards "in an out house where people did then and there resort."

The proof was that he was seen to play but on one occasion. The house in which the playing took place was described as an unoccupied store house in the town of Memphis, in Pickens county, and was one of a continuous line fronting on the street. At the time of the playing the doors and windows were closed, and it was so dark, that although it was day time, a candle had to be used. The house was commonly kept locked, and the key was kept by one White, of whom the defendant and others procured it at the time they played. A witness proved that he had seen persons playing

cards in this house once or twice, and that one of these times was the time at which said Swallow played.

The court charged the jury, that "if they believed the evidence, said house was an out house, and that if they believed that people resorted there for the purpose of playing cards, they must find the defendant guilty." The court refused to charge, at the request of the counsel for Swallow, "that if defendant had played at cards but once in said house, and had no knowledge of any other playing, that defendant should not be found guilty."

The counsel for Swallow, in his argument to the jury, maintained "that if any one or more of them should not be satisfied of the guilt of the defendant, it would be his or their duty not to consent to a conviction, but to stand out against a majority." In reference to this argument, the court charged the jury "that if any one or more of their number differed from the majority of the panel as to the guilt or innocence of the defendant, they might properly waive their convictions and agree with the majority, but were not bound to do so."

The charges of the court given as aforesaid, and the refusal to charge as requested, are assigned as errors.

A. B. Clitherall, for plaintiff in error.

M. A. Baldwin, Attorney General, *contra.*

1. Court charged if jury believed the evidence, it was an out house; and if they believed people resorted there for the purpose of playing cards that they must find defendant guilty.

There was no error in this charge. State v. Falconer, 2 McCord, 438; Cameron v. State, 15 Ala., 383.

2. The court charged jury, if any one or more of them differed with the majority, they might properly waive their conviction and agree with the majority, but were not bound to do so. This appears to me to be the proper rule, or else how can a jury ever agree when there is any difference of opinion? It was nothing more than the expression of a truism on the part of the court, as in Blackwell v. State, 9 A. R., 79.

3. The charge asked was properly refused. Playing once in a place inhibited by statute is indictable. Cameron v. State, 15 A. R., 383.

PHELAN, J.—This court has decided, in the case of Cameron v. State, 15 Ala., 383, that "the offence of gaming is complete by playing *once*." This case disposes of that point.

It is quite clear that a vacant store house, such as that described in this case, if habitually resorted to by persons for the purpose of playing cards, comes within the provisions of the statute against playing at any "out house where people resort." The case of Cameron v. State goes to this point also. The question whether it was so resorted to or not was properly left to the jury.

In the charge given by the court to the jury, "that if any one or more of their number differed from the majority of the panel as to the guilt or innocence of the defendant, they might properly waive their convictions and agree with the majority, but they were not bound to do so," we think the court erred. This charge it appears was elicited by the argument of defendant's counsel to the jury, in which he contended it was the duty of every juror to "stand out against a majority" if not satisfied himself of defendant's guilt. It is better to give such arguments free scope in criminal cases, than to meet them with a charge from the bench, which is at all calculated to embarrass the minds of a jury with nice distinctions in respect to their duty. The oath of a juror points out to him his duty plainly; it is, "to render a true verdict according to the evidence." That the plainest man can understand, and every honest man will fulfil. As to the consultation of the jury room, and the modes of arriving at one mind among twelve men, on a disputed question of fact, or of law and fact, there are no special rules to be laid down. In all cases of difficulty let them take their oath as a guide; how far each man will follow his own understanding of the case, or adopt the understanding of others, is left to himself. There may be nothing in the charge of the court that seriously militates with this view of the subject; still we are inclined to think, that the charge to a jury, that where one or more differed from the majority "they might *properly waive* their *convictions*," is such a charge as was calculated to mislead, and that this would not be cured by adding that "they were not bound to do so."

For this error in the charge of the court, the judgment is reversed and the cause remanded.

REEVES *vs.* THE STATE.

1. The caption of an indictment is that entry of record showing when and where the court is held, who presided as judge, the *venire*, and who were summoned and sworn as grand jurors; and this caption is a part of every indictment, and need not be repeated in any part of it.
2. An indictment was entitled in the margin, "The State of Alabama, *Butler* County," and in the body of the indictment it was recited that "the grand jurors," &c., "of the county of *Buter* upon their oaths present," &c. The name of the county was not again repeated, nor was any other county named. The offence was charged to have been committed "*in the county aforesaid.*" *It was held,*

That the indictment was not defective. The courts are bound to know the names of all the counties in the State; and there being no such county as *Buter*, the words "in the county aforesaid," must refer to the county stated in the margin of the indictment.

ERROR to the Circuit Court of Butler.
Tried before the Hon. Robert Dougherty.

WATTS, JUDGE & JACKSON, for the plaintiff in error.

1. The indictment was defective, in not showing that the offence was committed in a county over which the court had jurisdiction. The court was bound judicially to know that there was no such county as *Buter* in the State of Alabama. See Chitty's Crim. Law, marginal page 194, and note stating N. C. decisions.

2. If two counties be mentioned, one in the margin, and then a fact is described as having occurred in another, *e. g.,* Butler, in the margin, and the fact is stated to have occurred in "*Buter*," and afterwards the offence is stated to have been committed at a place "in the county aforesaid," without showing which county is intended; this will refer to the last antecedent county, viz., "*Buter*," and the indictment will be insufficient. See Chitty's Crim. Pl. marginal p. 194.

M. A. BALDWIN, Attorney General, for the State.

1. The only question in this case is this; is the venue sufficiently laid in Butler county?

To determine this question, it is necessary to inquire whether the words in the body of the indictment, "*in the county aforesaid*," refer to "*Buter county*," in the caption, or to Butler county, in the margin.

2. Though it is necessary to aver the *venue* in the body of the indictment, yet if it be laid in the margin, the venue in the body of the indictment may be properly laid by the words, "*in the county aforesaid.*" 1 Chitty Cr. Law, 194; Barnes v. State, 5 Yer. 186; The State v. Nixon, 18 Verm. 75; The State v. Gilbert, 13 Ib. 647; Morgan v. State, June Term, 1851.

3. The caption of an indictment is the style of the court at which the indictment is found, and one caption answers for all indictments of the term, and concludes with the words "*it is presented that.*" 1 Chitty Cr. Law, 327; 1 East P. C. 113.

4. The caption forms no part of the indictment. 1 Chitty Cr. Law, 326; 9 Porter, 487; Kirk v. The State, 6 Miss. 471; Duncan v. State, 1 Scam. 457; People v. Jewett, 3 Wend. 322.

5. If the caption is rejected as surplusage, there is no county mentioned in the indictment but Butler in the margin, and the words "*county aforesaid,*" in the body, will have reference to it.

6. The caption in the court below shows that this indictment was found by a grand jury, legally sworn and charged for Butler county, and the unnecessary statement in the caption of the indictment, that the grand jury were empannelled for another county, cannot vitiate the finding of the grand jury. State v. Murphy, 9 Por. 487.

7. The indictment recites, the grand jurors were of "the State of Alabama." The court is bound judicially to know that there is no such county in the State of Alabama as *Buter* county. There is no county in the State mentioned but Butler county in the indictment, and the words "in the county aforesaid," refer to that county. People v. Breese, 7 Cowen, 429; The State v. Hardin, 1 Brevard, 47.

8. The court will intend that Buter and Butler indicate the same county. The State v. Steadman, 7 Por. 496.

DARGAN, C. J.—The plaintiff in error was indicted in the Circuit Court of Butler, for an assault and battery committed upon one Alexander McCarty. When required to plead, he demurred to the indictment, but his demurrer was overruled, and upon the trial he was convicted. The cause

is brought here by writ of error, and the sole question is the sufficiency of the indictment. The language of the indictment is as follows: "The State of Alabama, Butler county, Circuit Court, Fall Term, Eighteen hundred and fifty. The grand jurors of the State of Alabama, elected, empannelled, sworn and charged to inquire for the body of the county of *Buter*, upon their oath present, that James Andrew Reeves, late of said county, on the first day of August, in the year of our Lord one thousand eight hundred and fifty, with force and arms, in the county aforesaid, in and upon one Alexander McCarty, in the peace of God and said State then and there being, did make an assault," &c.

It is insisted, that the indictment is defective, because it does not show in what county the offence was committed; that the words in the body of the indictment, "in the county aforesaid," must refer to the last antecedent, or the last county named in the indictment, and therefore refer to *Buter* county, and not to Butler county, stated in the margin; and as there is no such county in the State as Buter, the words, "in the county aforesaid," do not specify or designate any county. But we think, for the very reason that there is no such county as that of Buter, it therefore necessarily follows that these words must refer to the county of Butler, stated in the margin. The pleader says, "*in the county aforesaid.*" What county in the State was before named? None other than Butler; therefore none other could have beeen referred to. We are bound to know all the counties in the State; and if but one is named in an indictment, and it is afterwards referred to by the words, *in the county aforesaid*, there is not the least uncertainty in determining to what county the pleader referred. The case of the State v. Hardin, 1 Brevard, R. 47, we consider directly in point, if it were necessary to refer to any authority to sustain the proposition.

It has, however, been argued, that if the county of Lowndes, or Montgomery, had been used, in the stead of the county of Buter, then the words, "*in the county aforesaid*," must have referred to the last county named in the indictment; and so it would have appeared that the offence was committed without the jurisdiction of the Circuit Court of Butler. I admit that if any county in the State besides Butler had been

named in the indictment, and in a part of the indictment subsequent to the margin, then the words "in the county *aforesaid*," might not have shown, with sufficient certainty, in what county the offence was committed; but as there was no other county than Butler named in the indictment, none other could have been referred to.

Nor is it necessary that the name of the county should be repeated, in that part of the indictment where the pleader has inserted by mistake Buter for Butler. But in framing an indictment, after stating the name of the county in the margin, is sufficient to say, "the grand jurors *on their oath present*," &c., leaving out that portion which we usually find inserted, "of the State of Alabama, empannelled, sworn, and charged to inquire for the body of —— county." The caption of an indictment is that entry of record showing when and where the court is held, who presided as judge, the *venire*, and who were summoned and sworn as grand jurors; and this caption is applicable to, or is a part of every indictment, and need not be again repeated in any part of the indictment. The State v. Murphy, 9 Porter, 487; The State v. Morgan, decided at the last term; and although an attempt to insert a part of the caption, if erroneously done, may in some cases vitiate, it can never be of benefit. But after stating in the margin the name of the State and the county, the pleader may at once proceed: "the grand jurors on their oath present," &c., and a reference to the caption will show when, where, and under what authority the presentment was made.

Let the judgment of conviction be affirmed.

ROBBINS *vs.* THE STATE.

1. When a husband is indicted for an assault and battery on his wife, he may show, in mitigation of the fine, that *at the time* of the assault he was immediately provoked to its commission by her bad behaviour and misconduct.

ERROR to the Circuit Court of Marshall.

Tried before the Hon. L. P. Walker.

The plaintiff in error was indicted for an assault and battery committed on his wife. On the trial, he offered to give in evidence "her misconduct and bad behaviour at the time the alleged assault and battery was made, in mitigation of the offence charged, and for the consideration of the jury in their assessment of the fine." The court excluded the evidence, to which the defendant excepted, and which he now assigns as error.

C. C. CLAY, Jr., and L. WYETH, for plaintiff in error.

In most of the States of the Union, as well as in England, the judge, and not the jury, assesses the *amount* of the fine, as well as fixes the term of imprisonment, in cases of this sort; and hence, in part, the paucity of decisions in *criminal prosecutions*, bearing on this particular point. But in those States where the rule, as stated, prevails, the judge is informed before sentence, of those extenuating circumstances, which enable him to proportion the *penalty* to the actual *criminality*.

It is not proper, on the plea of not guilty, to allow extenuating circumstances to be given in evidence to the jury. They should be submitted to the court on sentence day.—Bay's R. 62.

In *civil* cases, frequent adjudications are found sustaining the principle that the attending circumstances should be made known to jury, in order that they might intelligently mete the punishment and compensate the wrong.

In civil actions for assault and battery, defendant may give in evidence mitigating circumstances, immediate provocations, &c.—1 Mass. R. 12.

Matter of provocation cannot be shown in justification, unless immediately preceding an assault and battery.—9 Miss. 531.

There is no difference, and there should be none, between the principles of evidence in civil and criminal cases.—Roscoe Cri. Ev. 1.

In the State of New York, where the judges assess the *fine* in assaults and batteries, it has been held that, "On an *indictment*, trial will not be stayed because a civil suit is pending for the same assault and battery, though it seems *judgment* may be stayed after conviction, until after the decision of the civil suit."

In Alabama, it has been held that the mere *pendency* of a civil suit for the same assault and battery, might be given in evidence in mitigation of, and to lessen the amount of the fine.—1 Stew. R. 399.

It is conceived, that abusive and improper conduct, immediately preceding the act complained of, is more to be regarded in estimating the quantum of *guilt* and *proper punishment*, than the mere fact that a civil suit for damages for the same wrong is pending or decided.

The bill of exceptions discloses the fact that the party assaulted was the wife of the defendant below. It is not denied, that a husband may be convicted for an assault and battery on his wife; but it is insisted, that by the ancient common law he had the power of chastising his wife, and although this doctrine finds no advocate in modern time, yet no "court of law in the last resort" has assumed the legislative function, and absolutely denied its present existence.

M. A. Baldwin, Attorney General, for the State.

1. In an indictment for assault and battery, the rule is, that provocation immediately preceding the battery is admissible in mitigation of damages; *aliter*, if a cooling time elapse.—Jacanay v. State, 7 Yerger, 82–84; Wright v. State, 9 Ib. 342; Watson v. Christie, 2 B. & P. 244; Bull. N. P. 17; 1 Salk. 11.

2. The case of Autrey & Autrey v. State, 1 Stew. 399, relied on by defence, bears no analogy to this case. In that case it is said, that the reason why the pendency of a civil prosecution may be shown in mitigation of damages is, that the object of the law is the reformation of the offender; and this object may be accomplished as well by the civil as the criminal prosecution.

Evidence of the misconduct and bad behaviour of the injured party has no tendency to the reformation of the defendant. But if the provocation *immediately precedes* the battery, evidence of it is admissible out of regard to the frailty and passion of human nature. There is no evidence as to the time the wife misbehaved or acted badly.

CHILTON, J.—The question in this case is, whether, if a

husband commit a battery upon the wife, the circumstances of provocation attending it, which her bad behaviour and misconduct afforded, may be given in evidence to the jury in order to mitigate the fine. We think the law is, that circumstances of provocation occurring at the time, and immediately inciting the party to the unlawful act, may be received in extenuation to mitigate the fine. The law so far regards the frailty of human nature, as to distinguish between him who, upon sudden provocation, commits an unlawful act, and one who does it wantonly and deliberately. The same measure of punishment is not, and ought not to be applied indiscriminately to both. So in this case, if the husband was *at the time*, as is shown by the bill of exceptions, provoked to this unmanly act by the bad behaviour and misconduct of his wife, he should not be visited with the same punishment as if he had without provocation wantonly and brutally injured one whom it was his duty to nourish and protect.

It results from this view, that the evidence of provocation was improperly excluded from the jury, and the judgment is consequently reversed, and the case remanded.

WINTER AND SCISSON *vs.* THE STATE.

1. In a criminal prosecution it is error for the court to charge the jury, that if the proof left the question of the guilt or innocence of the accused in equipoise, they could not, on that account alone, acquit.
2. To warrant a conviction on an indictment for feloniously aiding slaves to escape from the service of their master, the State must prove that the defendant *aided* the slaves to escape, and that *they were the slaves* of the person whose property they are averred to be in the indictment.

ERROR to the Circuit Court of Fayette.

Tried before the Hon. Wm. R. Smith.

WM. S. EARNEST, for plaintiffs in error.

The declarations of a party in possession are competnet to show in what way he holds said property, and as against his interest are conclusive. The evidence here shown, in an

action for the freedom of the boys against intestate, would clearly establish their freedom. The prosecution stands precisely in the same attitude as intestate would. 4 A. R., 40; 8 ib., 653; P. Ev., 592 to 601.

The fact that Jones carried one of the boys to a free State was conclusive as to the freedom of him, and the court should so have charged.

The court erred, in charging the jury that if they believed the boys were mulattoes, that that fixed the presumption of slavery. Scott v. Williams, 1 North Carolina, 376; see Laws on Slavery by Wheeler, 406; the same doctrine is held in Louisiana;

In refusing to give the charge that the presumption of color was rebutted and destroyed by the declarations of Jones that they were free and born of a free woman, and his treating them as free and never having exercised acts of ownership over them for fifteen years;

In refusing to charge the jury that if they had a reasonable doubt of the slavery of the boys, that they must acquit. The slavery of the boys is the very gist of the prosecution. If they were not slaves, the defendants did nothing wrong.

The administrator has no right to the boys except the right of the intestate, and if Jones never had possession of them as slaves, and the administrator after his death never had possession of them as property, the court erred in refusing to give the jury the charge, if they believe the above facts that they must acquit the prisoners.

To sustain this action requires the same proof that would be necessary to sustain an indictment for larceny. Hence the owner must be correctly stated, and the proof must sustain the charge. Hence the court erred in refusing to give the last charge asked.

M. A. Baldwin, Attorney General, for the State.

1. Was the charge of the court that "*mulatto was a presumption of slavery*" correct?

Mulatto is an equal admixture of the African and white race. State v. Thurman, 18 A. R., 276.

The only authority I have been able to find against the charge of the court is a decision from North Carolina, 2

Hayw. 170, and it is based upon the supposition, that when the descent of a mulatto cannot be proved, the *chance* of descent from a *white* mother is equal to that of his having descended from a negro mother.

Now if such was the fact, that mulattoes are descended as often from white mothers as from negro ones, then there might be something in the reason assigned. As a general rule, they are always descendants of negro mothers, and the cases of descents of mulattoes from white mothers are merely exceptions to the general rule.

In Virginia and Kentucky, it has been decided that a black or mulatto complexion is *prima facie* evidence that the person of such color is a slave. 3 Dana 385.

2. The charge asked, that the declarations of Jones that they were free, and born of free women, &c., was SUFFICIENT to destroy the presumption of slavery arising from color, was very properly refused by the court.

It is not the province of the court to charge on the *sufficiency* of testimony, 4 Por. 321; and besides, the court is asked to charge the jury, that if Jones *said they were* free merely, then they must find it, without regard to their belief whether it was so or not.

The fact that Jones treated them as his children was no evidence of freedom.

3. The declaration of Jones was only admissible as to pedigree.

It is a general rule that *hearsay evidence* is never admissible, except in cases of pedigree, prescription, custom, &c. The declarations of Jones were admissible to prove who was the mother of the boys, but not to prove whether she was free or not. The fact whether their mother was free or not was a specific fact, and susceptible of proof. 1 Wheat. 6; 7 Cranch 291 4; Rand. 617.

Were the declarations admissible, as being made by a party in possession, and against his interest? Neither Jones, nor his representative, was a party to the suit. Such declarations can only be given in evidence in a case where the declarant is a party or privy.

4. Upon the point of the doubt as to the slavery as charged by the court; see 2 Grattan 575, 8 Yerger 233.

LIGON, J.—The plaintiffs in error were indicted in the Circuit Court of Marion for feloniously aiding two slaves, Henry and George, to escape from their master's service. The State proved that Henry and George were mulattoes, that they had lived with one Jones for several years, when Jones died, and the prosecutor, Ship, became his administrator, but did not include in his inventory the boys Henry and George. The plaintiffs in error then introduced proof of facts, tending strongly to show that Henry and George were not slaves, but free persons of color. On this proof the court charged the jury, among other things, that, "If the presumption of slavery was raised, and fixed by color, the defendants must rebut that presumption by proving clearly that the boys were free; and if the matter as to the question of freedom or slavery was left in equipoise, they could not on that account alone acquit." To this ruling of the court the plaintiffs in error excepted. Several other exceptions were taken to the ruling of the court below, which it is not necessary for us to note.

No rule is better settled than that which requires a plaintiff, whether in a civil action or criminal prosecution, to prove the affirmative of the issue, before the defendant can be called on to exempt himself from the charge: in the former by a preponderance of proof, and in the latter beyond all reasonable doubt. It is also well settled that if, upon the whole proof, the charge is not made out beyond a reasonable doubt, the defendant must prevail; and if from the proof, the fact of guilt or innocence is left in equipoise, the jury should acquit. These principles are so well settled and established, that no citation of authority is necessary to sustain them.

To make out the charge against the plaintiffs in error, it was necessary that the State should have proved that the prisoners *aided* the boys Henry and George *to escape*, and that *they were the slaves* of the person whose property they are averred to be in the indictment. If it fail to establish either of these points beyond a reasonable doubt, or if, upon the whole proof, a doubt existed as to either, the prisoners, for this cause alone, should have been acquitted.

The Circuit Court having ruled to the contrary, the judgment must be reversed, and the cause remanded.

STERNE *vs.* THE STATE.

1. In an indictment under the act of March 6, 1848, (Pamphlet Acts,) charging the defendant with being "engaged in the business of hawking and peddling," it is unnecessary to allege the facts which constitute hawking and peddling. The gist of the offence under that statute is the *being engaged in the business* of hawking, &c.
2. Where the offence charged is complicated, consisting of a repetition of acts, or where it includes a continuation of acts, it is not necessary to set them out in the indictment.
3. A witness may, with the consent of the opposite party, state a legal conclusion; and the failure to object to an answer stating such a conclusion amounts to consent.
4. The penalties prescribed by the act of March 6, 1848, are not repealed by the subsequent act of February 9, 1850.

ERROR to the Circuit Court of Perry.

Tried before the Hon. John D. Phelan.

The indictment in this case alleged that the plaintiff in error "was engaged in the business of hawking and peddling, and being so engaged, he then and there pursued the business of hawking and peddling in one wagon," &c. A demurrer to the indictment was overruled, and the plea of not guilty was put in. On the trial a witness was introduced by the State, who, being asked on the part of the State if he knew in what business the defendant was engaged, answered that he was engaged in the business of peddling in Perry county, in October, 1848, with a wagon. No other questions were asked by either party. The court was requested to charge the jury:

1. That the proof that the defendant was engaged in the business of peddling, without showing that he had either sold or offered to sell some article or commodity, would not be sufficient to authorize a verdict of guilty;

2. That if they found the defendant guilty, they should assess such fine against him as in their discretion they should think proper under the proof.

These charges were refused, and the jury were instructed that if guilty the defendant must be fined three times the amount of the license money for hawking and peddling with a wagon. The overruling of the demurrer, the refusal to

charge as requested, and the charge as given, are assigned for error in this court.

A. B. MOORE, for plaintiff in error:

1. The indictment is defective, because the terms in which the defendant is charged are too general. 6 Ala., 664; Minor, R., 420.

2. The indictment pursues the language of the statute, but this is not sufficient, as the statute does not prescribe the constituents of the offence. 6 Ala., 664; 18 Ala., 535.

3. The words "hawking and peddling" are the mere name of a particular business, which does not, with necessary certainty, imply what acts constitute "hawking and peddling;" and if they did, this would not make the indictment good, as every thing necessary must be expressly alleged, and not left to implication.

4. The defendant cannot be convicted without proof that he sold some article or commodity, and if it be necessary to make such proof, it is equally necessary to allege it in the indictment.

5. The court erred in refusing to give the first charge asked, as the defendant could not be found guilty without proving that he had sold something, and that more than once.

6. The court should have given the second charge asked, as the act under which the indictment was found was repealed before the trial, and a different penalty affixed. The proviso extends only to the right to continue prosecutions commenced. The penalty is repealed.

M. A. BALDWIN, Attorney General, for the State:

1. The demurrer to the indictment should have been overruled. In an indictment founded upon a statute, introductive of a new offence, it is sufficient to describe the offence in the words of the statute. State v. Duncan, 9 Por., 260; State v. Click, 2 Ala. Rep., 26.

The true rule is, where an offence is created, and its constituents prescribed, it is sufficient to pursue the words of the statute. And it is always sufficient to pursue the very words of the statute, if by doing so the offence be *fully, directly and expressly alleged.* 6 Ala. Rep., 664; 15 Ala. Rep., 259.

Hawking and peddling are technical terms, and averring in the indictment that the defendant was engaged in, and pursued the business of hawking and peddling, was *directly and expressly* alleging that the defendant "carried about commodities and sold them," which is the meaning of the word peddle.

Suppose the indictment was for engaging in the business of keeping a nine pin alley, would not pursuing the words of the statute be sufficient? All unnecessary particularity would be surplusage. So, it would be surplusage to state in this indictment that defendant sold or offered to sell goods, for this is contained in the charge of peddling.

In Tennessee, a warrant charging the defendant with hawking and peddling without license is sufficiently specific and valid. State v. Sprinkle, 7 Humph., 36.

2. If the answer of the witness was too general, objections should have been made at the time. 4 Ala. Rep., 48; 5 S. & P., 421.

Besides, the charge asked should have been refused, on the ground that the court has no right to determine the *weight* of evidence; that is a matter for the jury. Wiswall v. Ross, 4 Por., 331; 2 Munf., 230; 4 Rand., 256; 16 Wend., 663.

3. The second charge asked was properly refused. This was an indictment under the Revenue Act, 1848, and the fine is fixed. The Revenue Act, 1848, was repealed by the act of 1850, and would have been a repeal of all violations of the Act of 1848, had it not been for the saving clause of 1850. Hirschfelder v. State, 18 Ala., 166.

GOLDTHWAITE, J.—The first question arises on the sufficiency of the indictment, which it is insisted is defective for the want of sufficient certainty, or in other words, that the particular acts necessary to constitute hawking and peddling must be alleged. It is conceded that, as a general rule, the indictment must contain the facts and circumstances which constitute the offence, alleged with such precision and certainty that the defendant may demur or plead to the indictment, that he may be able to prepare his defence, and that there may be no doubt as to the judgment to be given on his conviction, Arch. C. P., 39; but we do not understand from this rule that it is necessary to explain the meaning of

words used, or to set forth the evidence. It may be that if the law had made it a penal offence for any one to hawk or peddle, that it might be necessary to allege the particular act of hawking and peddling, and that the charge in general terms, although in the words of the statute, would not be sufficient. But such is not the case we are called upon to decide. In the case presented the gist of the offence is not the hawking and peddling, but the being engaged in it under such circumstances as show that the defendant followed the pursuit *as a business.* It is not necessary, therefore, under the operation of the rule referred to, to set forth the facts which constitute hawking and peddling, any more than it would be required in an indictment for keeping a pool or bagatelle table without a license, to state what constitutes such table. It would be simply giving the definitions of the terms used, and could do the defendant no good in informing him of the particular facts which he was called upon to defend; nor would it advise the court in relation to the judgment to be rendered, for the court is bound to know judicially the meaning of the terms employed. As, however, the general rule requires the ingredients of the offence to be stated in the indictment, so in this case, unless relieved from the operation of that rule, the facts and circumstances should be stated in the indictment, which would show that the defendant was engaged in the business of hawking and peddling.

In the case of Moore v. The State, (16 Ala. Rep., 411,) the statute on which this indictment was framed received a judicial construction, and it was there held that the term "business," as used in that statute, was synonymous with employment, and that one who, without being engaged in the particular business, did a single act appertaining thereto, did not fall within its meaning. It follows from this decision that any number of acts of hawking and peddling would not necessarily and as a legal conclusion constitute the offence intended to be covered by the statute, however proper the evidence of such acts might be to enable the jury to arrive at a correct result as to the guilt or innocence of the defendant. The term "business," therefore, as employed by the statute, being continuous in its character, not necessarily implying a single act or any number of acts, forms an exception to the general

rule before stated, and falls within the principle applicable to barratry and some other offences, that where the charge is of a complicated nature, consisting of a repetition of acts, or where the offence includes a continuation of acts, it is unnecessary to set them out in the indictment. Hawkins P. C. Bk. 2, Ch. 25, § 59; Ch. C. L. 231. For these reasons, we hold the indictment was good.

The next question is presented by the refusal of the court to give the first charge. The charge as requested is equivalent to asking the court to charge that, upon the whole evidence, the defendant should be acquitted, and involves the same question as a demurrer to the evidence would have done. It is unnecessary to decide whether the answer of the witness stated a legal conclusion; conceding such to have been the case, it was perfectly competent for him to do so by the consent of the defendant, and by allowing his answer to pass without objection, the defendant assented to its correctness. That being done, the legal conclusion, if it was one, must be taken as correct. There was no error in refusing this charge.

The only remaining question on the record is settled by the terms of the proviso of the act of 9th February, 1850, which provides that no prosecution originating and unclosed under the existing laws, should be released or affected thereby. The act of 1848, under which the indictment was found, prescribed the amount of the fine for the offence charged at treble the amount of the license money. The plain object of the Legislature was not to affect the prosecutions under the first act in any way. The charge of the court upon this point was correct. The judgment is affirmed.

BYTHWOOD ET AL. *vs.* THE STATE.

1. Indictment for playing cards "at a *public place*." The proof showed that there was a large assembly of persons on a public day at a certain store house in the country. The defendants, five in number, "went into a piece of woods where the under growth was very thick, and into a deep hollow in said woods

about four hundred yards from said store, and out of sight of any road," and there engaged in a game of cards. Whilst so engaged, three other persons came to the same place, and took part in the game, one of whom testified, that when he went into the woods he did not know where the defendants were, but hunted them up; that he had never known cards to be played at that place before, but that during the previous year he had known persons to play "in the piece of woods," some fifty or one hundred yards from "said hollow." *It was held,*

That the playing was not "*at a public place.*"

ERROR to the Circuit Court of Wilcox.

Tried before the Hon. Robert Dougherty.

The plaintiffs in error were indicted under the statute, for playing cards "in a *public place.*" The facts, as shown by the bill of exceptions, were these. Some time in the summer of 1851, there was a large collection of people at Pharr's store, in Wilcox county, to hear the discussion of the candidates. On that day the persons named in the indictment, five in number, "went into a piece of woods where the under growth was very thick, and into a deep hollow in said woods, about four hundred yards from said store, and out of sight of any road," and there engaged in a game of cards. Whilst so engaged, three other persons came to the same place, and also took part in the game of cards. The witness, who was one of the party, said, that when he went into the woods, he did not know where the other persons were, "but hunted them up." He stated, also, that he never knew cards to be played at that place before, but that during the previous year he had known persons to play at cards in the "piece of woods," some fifty or a hundred yards distant from the place where this playing took place. On this state of facts, the court charged the jury, that if they believed the evidence, they must find the defendants guilty.

The charge of the court is assigned for error.

F. K. BECK, for plaintiffs in error.

The charge of the court in this cause seems to have been based upon the idea that the defendants played in a place made public by an assemblage of persons. That this view is incorrect, is shown by the facts and circumstances attending the playing, the nature and character of the place, and the

care taken by the defendants to insure their privacy. The case of Coleman *et al.* v. The State—opinion delivered at this term—is decisive of this.

M. A. BALDWIN, Attorney General, for the State.

1. Every place is a public place where the people have a right to go. The woods is a place where the people have a right to go, and are apt to go, especially that portion within four hundred yards of a store where a large number of persons is assembled. Campbell v. The State, 19 Ala. 369; Flake v. The State, 19 ib. 551; Roquemore v. State, 19 ib. 528.

2. If this particular place was private in itself, it was made public by the assemblage of the persons engaged in gaming, which were to the number of seven or eight. In the case of Coleman *et al.* v. The State, at this term, Dargan, C. J., says, "We must look at the *character of the place, the manner of ingress to it*, as well as the number of persons that are or do assemble at it, in deciding whether it is public or private." It is also intimated in the same case, that if persons to the number of *five or six* are in the habit of frequenting a place for the purpose of playing cards, the jury might find it a public place. In the case at bar, persons were in the habit of playing cards near the same spot in the woods where these defendants played; so near the same spot, that being in the woods, it may be said it was the same place.

PHELAN, J.—The effect of the charge of the court was, to declare the place where this card playing was done a "*public place.*" The defendants below could only be found guilty, according to law, on that ground.

Was that place public, or was it not? If public, it must be so in one of two ways; that is, it was of a public nature, public *per se*, like the street or highway, or it was made public at the time by force of circumstances.

That it was not public in its nature, it is not necessary to argue.

Was it, then, made public at the time, by force of circumstances?

What will make a place public, within the meaning of this

statute, which of itself is not so, is a question not very definitely settled by our decisions heretofore, and it becomes necessary, therefore, to resolve it upon principle.

If we look to the evil intended to be remedied by this statute of ours against playing at cards or dice in certain specified places, we cannot come to any other conclusion, than that it was the intention of the legislature to inhibit card playing only in places where the playing would be of evil example and influence, to others than those engaged in playing themselves. It must always be borne in mind, when considering this subject, that the exhibition of *gaming tables* and merely *playing at cards* are put upon a very different footing by the statute. *Gaming tables* are forbidden every where, without regard to place; *card playing* is only forbidden at certain places. The legislature did not intend to denounce the fact of playing at cards as a vice or crime in itself, nor is it so, any more than playing at chess or backgammon. But card playing is seductive; the practice of it, especially by the young and thoughtless, leads to *gambling;* and it was its exposure, and the temptations thus offered to others, that the law intended to prohibit. To do this, certain places are expressly inhibited; they are, "tavern, inn, store house for retailing spirituous liquors, or any public house or highway," and then the statute adds, "or any other *public place*, or any out house where people resort."

When the playing is in any of the places specially enumerated, there is a plain rule to go by, and no matter what secrecy is given to such playing, those engaged must know that it is contrary to the statute. But the want of some well settled rule as to what shall make a place a *public place*, within the meaning of this statute, which is *not so of itself*, and which is not specially named, is calculated to embarrass, and perhaps mislead those who would not be willing to violate the law, if they fairly understood it.

It was my wish, for this reason, to endeavor to define and settle some rule upon the subject; but the majority of the court think that it is better, all things considered, not to attempt to lay down any general rule, but to leave the cases to be decided as they arise, each upon its own peculiar facts and circumstances.

The facts and circumstances which distinguish this case do not, in our opinion, make the place where the playing took place a *public place*, within the meaning of the statute. These persons went to that hollow evidently to be out of the way of observation, to be, in fact, *concealed* from the public view, and it is not reasonable to hold that their being there made that retired and secluded spot a *public place*, merely because they went to play cards, when, as has been shown, the evil intended to be averted was not the card playing itself, but the effect of the example upon others.

For the error in the charge of the court, the judgment is reversed, and the cause remanded.

COLEMAN ET AL. *vs.* THE STATE.

1. The assemblage of eight or ten persons by invitation, at a private house or room, to which the public have not the right to go, for the purpose of playing cards, or participating in social amusements, does not constitute such house or room "a public place," within the statute against gaming.
2. If the occupants of a room are in the constant habit of inviting a number of persons to their room for the purpose of playing cards, and others are allowed to come uninvited without any restraint, it is testimony tending to prove the room "a public place," and the jury may so find it.

ERROR to the Circuit Court of Sumter.
Tried before the Hon. Wm. R. Smith.

BLISS & BALDWIN, for plaintiffs in error.

M. A. BALDWIN, Attorney General, for the State.

DARGAN, C. J.—The plaintiffs in error were indicted and convicted of "*playing cards* at *a public place.*" Upon the trial it appeared, that the playing took place in a room over a vacant store, which was occupied by several young men as a bed room; that they frequently invited their acquaintances there for the purpose of playing, but no one had the right to come without being invited by some one of the occupants of the room; that their invitations extended to their friends and

acquaintances only, and that they did not intend to make their room public, but considered it their private bed room. It was further shown, that some eight or ten persons were present at the time the playing took place, and one of the witnesses, who was present, stated that he did not remember whether he was invited or not. It was further shown, that though the doors were usually shut, it was not usual that they were locked or so fastened, as to prevent one from entering the room.

Upon this evidence the court instructed the jury, that *prima facie* a bed room was a private place, but it might be made public, and if they believed that eight or ten persons were present in the room whilst the playing was going on—some playing and others by-standers—the doors not being locked, then such an *assemblage* made it a public place; and if the defendants played at that time, or afterwards before the room resumed its private character, they might be convicted of playing at a public place. The court further instructed the jury, that if they should find that frequently, before and about the time of the playing, five or six persons were in the room playing, although they went by invitation, and one or more persons who were not invited were there as by-standers, and had found the door unlocked, and entered without difficulty, then they might find the room a public place within the meaning of the statute. These are the only instructions given by the court to the jury that we think it necessary to examine.

We fully agree with the court below, that though a bed chamber is *prima facie* a private place, yet it may be made public within the meaning of the act; but the second branch of this first charge (if we construe it properly), conveys the idea that the presence of eight or ten persons, who were there by invitation, the doors not being locked, would make it a public place.

In this, we think, the Circuit Court mistook the law. I will not undertake to lay down a general rule, by which we shall, in all cases, determine whether a place is public *or not.* But we cannot hold that the *assemblage* of *eight or ten persons* at a private house or room, by invitation, and to which the public have not a right to go, for the purpose either of partici-

pating in the amusements going on, or partaking in the social enjoyments, will constitute such private house or room a public place, within the meaning of the act. If we were to hold this, we should be governed in our opinion by the number of persons alone, in determining whether the place was public, without regard to any other consideration. This, I think, would be improper; but we must look to the character of the place, the manner of ingress to it, as well as the number of persons that are, or do assemble at it, in deciding whether it is public or private. Suppose an evening party given, at which a dozen or more were assembled by special invitation, but to which no one could go *unless invited*, without violating the rules of propriety, would this constitute the house a public place? We think not. We cannot hold that a private house or a bed room, at which even a dozen or more are assembled by invitation, loses its character of privacy, and becomes thereby a public place. Nor do we think this view inconsistent with the case of Campbell v. The State, 17 Ala. Rep. 369. The place in that case was a shoemaker's shop, to which the public had the right to go, at least during the day; and though the playing took place at night, yet it was shown that during the playing many persons, without invitation, passed in and out without restraint, though others were refused admittance. These ingredients, as well as the number assembled, were considered by the court, in holding it a public place; but the part of the charge we are considering would make any place public, if eight or ten were assembled together, without regard to any other consideration. This, we hold to be erroneous.

We cannot say, however, that the second instructions given to the jury, were wrong; for if the occupants of a room are in the constant habit of inviting a number of persons—say five or six—for the purpose of playing cards, and to which others are allowed to go without being invited, and without restraint, it is certainly testimony tending to prove the room a public place, and a jury may so find it. To hold otherwise, might enable those who wished to follow the practice of gaming, even as an occupation, to escape the law, by having their beds in the room at which the gaming was carried on.

In reference to the charge which we have not particularly noticed, it is enough to say that we can perceive no error in them. The only error is in the first instructions, and for this, the judgment must be reversed, and the cause remanded.

SABRA THOMPSON *vs.* THE STATE.

1. A count, in an indictment for obstructing a public road, which alleges that the defendant "a certain impediment, to-wit: a large quantity of logs, sticks, brushwood and dirt, did erect and cause to be erected," &c., is good.
2. It is not necessary that the width or grade of the road charged to have been obstructed should be set out in the indictment.
3. When the proceedings of the Commissioners' Court in the establishment of a public road are removed by *certiorari* into the Circuit Court, and the order establishing the road is there quashed and the *supersedeas* perpetuated, the judgment of the Circuit Court applies only to the proceedings then before it, and has no effect on an order subsequently made upon a new and distinct application.
4. A crop which is sown or planted in an enclosure after the Commissioners' Court has passed an order establishing a road through it is not a "growing crop" within the protection of the statute, (Clay's Digest 507, § 4) although it may be growing at the time the road is ordered to be cut out.
5. A literal interpretation, which would defeat the purposes of a statute, will not be adopted, if any other reasonable construction can be given to it.
6. When a person is indicted for obstructing a public road, and it is shown that he had extended his fences across the road while a former order of the Commissioners' Court establishing it, which was afterwards quashed by the Circuit Court, was in full force, the record of the former proceedings had by the Commissioners' Court is irrelevant and inadmissible to show the defendant's motive in obstructing the road after it had been again established.
7. And the admission of the record for that purpose is an error for which the judgment of conviction will be reversed.

ERROR to the Circuit Court of Talladega.

Tried before the Hon. E. Pickens.

RICE & MORGAN, for plaintiff in error.

1. Courts which originate in the common law possess a jurisdiction which must be regulated by the common law, until some statute shall change their established principles; but courts which are *created by written law, and whose jurisdiction is*

defined by written law, cannot transcend *that jurisdiction*. 4 Cranch, 93, 8 How. (U. S.) Rep. 441.

2. Where by *statute* a special authority is delegated to particular persons to take away a man's *property* against his will, it must be *strictly* pursued, and must appear to be so upon the *face* of the order. Rex v. Croke, 1 Cowper's Rep. 26; Commissioner' Court v. Thompson, 18 Ala. Rep. 694.

3. If the proceedings of the Commissioners' Court of a particular county, in the establishment of a road, do not show affirmatively that the road established lies within the limits of that county, its jurisdiction cannot be sustained, and therefore its proceedings are *void*, especially as to *the owner of the land* over which the road passes. Commissioners' Court v. Thompson, 18 Ala. Rep. 694; Carter v. Hinkle, 13 Ala. Rep. 529; 7 Ala. Rep. 578; 5 Blackf. Rep. 462; Wightman v. Karsner, January Term, 1852.

4. The provision contained in the second section of the act of 1836, (Clay's Dig. 507, § 4,) in these words, "but no new road shall be opened between the 1st day of March and 10th day of July in any year, nor open through any *enclosure* whilst there is a *crop growing* in the *same*," must be construed as embracing a *restriction upon the power* to open a new road, and as *restraining* the exercise of that power entirely between the 1st day of March and 10th of July in any year, either inside or outside of an enclosure, and also as *restraining* the exercise of that power *on any day of any year*, as to "*enclosures*" in which *a crop* might at the time be *growing*. 3 Howard's (U. S.) Rep. 707; 13 Ala. Rep. 529; Daniel v. Sorrelle, 9 Ala. Rep. 445; 2 Cowen's Rep. 424; 7 Ala. Rep. 578.

5. The judgment of the Circuit Court of Talladega county rendered at its Fall Term, 1849, quashing the order for this *same road*, and declaring the *supersedeas perpetual*, (the said judgment never having been reversed,) is conclusive upon *the parties thereto*, to-wit: the *Commissioners' Court* and Sabra Thompson; and rendered any further action of the Commissioners' Court *void* as to *that road*, so far as said Sabra Thompson was concerned. 3 Strobhart's Equity Rep. 44; 16 Ala. Rep. 17; 7 Ala. Rep.; 16 Ala. Rep. 271.

6. No matter how much legal evidence there was to establish any particular point, still if the court admitted any illegal

evidence on that point, the error is one for which there must be a reversal. 8 Porter 258; 14 Ala. Rep. 681; 1 Munford 288. Several portions of the evidence are clearly illegal.

7. The true question arising out of the fact, that Sabra Thompson had "*a crop growing in the enclosure*," was a question involving only the POWER to *open the road* through *such enclosure*. This question of POWER to *open* the road could not be affected in any way by *her motive* or *intention* in sowing the crop, nor by the *size* of the crop. The existence of *the power to open* the road depends on *the fact* that there *was* NO *growing* crop in the enclosure; and this *power to open* the road cannot arise out of the existence of any particular *motive* or *intention* in sowing the crop. Whatever may have been the *motive* for sowing the crop, still that motive could not create the *power* to open the road through the enclosure, if a crop was growing therein, whether it was a large crop or a *small crop*. Six Carpenters' Case, 43 Law Library, top page 130; 3 How. (U. S.) Rep. 707, 715. (This shows that the testimony as to *motive* was irrelevant and illegal, and erroneous.)

8. The fourth count of the indictment is defective, for several reasons, among which may be noticed the following, to-wit: 1. It assumes erroneously that the provision *against erecting* a fence, bar, "*or other impediment*," in the seventh section on page 508 of Clay's Digest, is precisely equivalent and tantamount to the provision against *felling* a tree, brush, "*or other obstacle*" in the same section. 2. It confounds distinct clauses of the same statute, and violates the well settled rules for construing statutes. 3. The description of the road is too vague. Bush v. The State, 18 Ala. Rep. 415. 4. The width or *grade* of the road is not averred in the indictment. This is a fatal omission, and would be fatal to the order for the road. 2 U. S. Digest (supplement) 935, § 169.

9. A new road does not become a public road until it is actually *opened according to the statute, to the use of the public.* 21 Pick. Rep. 48–49; Kelley v. Horton, 2 Cowen 424.

The proof shows clearly that the road had not been *opened to the use of the public*, when the alleged obstructions occurred.

10. The right of the owner of land over which the road passes, to regard and treat the proceedings for establishing a

new road as void, *exists in cases* where other persons could not treat them as void. They are *void as to the owner* in some cases, where they are not void as to others. 3 Metc. Rep. 445; 4 Iredell's Rep. 318.

11. Obstructions or inpediments thrown in the way of an overseer, who is *opening* a new road, are not indictable, and are *not charged in this indictment*, and evidence as to such obstructions or impediments was improperly admitted.

The case cited (Kelly v. Horton,) from 2 Cowen 424, shows that although the road is laid out by a valid order, yet the *overseer* may be, and is a *trespasser* in *opening* it, if he disregards any provision of law for the benefit of the owner of the land, (such as a protection by *sixty days notice*, or "a GROWING crop.")

12. However *small* the *crop which* was admitted to be *growing* in "the enclosure," this protected the enclosure "*whilst*" it was growing; even if there was some woodland in the same enclosure. Com. v. Carmalt, 2 Binney's Rep. 235.

13. The admission of the declaration of defendant, for the declared purpose for which it was admitted, was a clear error, and could not fail to mislead the the jury; although the declarations of a defendant may be admitted, wherever they relate to any matter which is *relevant* in the cause, yet if *the subject matter* of the declaration is *irrelevant*, it must be rejected.

14. But if it were conceded, for the sake of argument, that the *intention* of defendant could destroy the plain *restriction of the statute on the power to open the road* through the enclosure, and deprive the enclosure of the protection given to it by statute, then the *intention* must be proved to be an intention to *evade or defeat the law*, and that intention, as *matter of fact*, must be left to the jury, which the court did not do. Oliver v. The State, 17 Ala. Rep. 587.

M. A. BALDWIN, Attorney General, with whom was L. E. Parsons, for the State.

1. The power of the Commissioners' Court of Roads and Revenue, in relation to laying out and establishing public roads, is judicial, and their proceedings are conclusive until reversed. Robins v. Town of Bridgewater, 6 N. H. 524; Woodman v. Somerset, 25 Maine 303; Loring v. Bridge, 9

Mass. 124; Com. v. New Milford, 4 ib. 446; Clark v. Holmes, 1 Doug. (Mch.) 399; U. S. v. Arredondo, 6 Peters 729.

Where a road, established by proper authority, passes over the land of another, he cannot close up or obstruct it, for any matter or cause which, had it been presented properly to the Commissioners' Court, would have defeated the establishment of the road. The fact that a road passes over the growing crop of another, is a matter which no one can plead against the establishment of the road, but the owner thereof; it is then voidable, and not absolutely void. The object of giving notice before laying out and establishing a public road is to give (amongst other things) the owner of lands, through whose growing crop the road proposes to pass, an opportunity to object; if he does not do so, the law presumes his acquiescence. He is entitled to damages, in some instances, for the injury he sustains, by reason of the road passing through his land: *Provided he makes application at the next court after the laying out the road.* Suppose he makes no application for damages, would that authorize him to obstruct the road after it was established? Witherspoon v. The State, Mart. and Yerg. 119; 8 Barr 522; 9 Johns. 365; 2 Bibb 19; 7 Wend. 145; 3 Met. 448; 5 Ohio 273.

2. After the report of the Committee of Review, locating the road, is received and adopted by Commissioners' Court, the road from that moment becomes a public road. Clay's Dig. 507, § 4–5; The State v. Dover, 10 N. H. 396.

The road was not opened until February, 1851, at which time the crop of 1850 had been gathered. The order establishing the road was in August, 1850, at which time the wheat crop of that year was not planted or sown in the enclosure of defendant, through which the road passed. It was folly then in the defendant to sow her grain, when she knew it would not ripen before the road was to be open by law. The right of the defendant to gather this crop of wheat assimilates itself to the right which *a lessee, for a term of years, has to the emblements that are growing when his claim expires.* If the latter plant a crop, which does not ripen or is not gathered before his term expires, the emblements become the property of the landlord. 2 Black. Com. 145; 4 Kent.

Com. 109; Razor v. Qualls, 4 Blackf. 288; Whitmarsh v. Cutting, 10 Johns. 360; Bain v. Clark, ib. 424; King v. Fowler, 14 Pick. 238.

CHILTON, J.—The plaintiff in error was indicted for erecting an impediment across a public road. The indictment contains five counts, to each of which there was a demurrer.

It is argued in this court that the fourth count in the indictment is bad, as confounding different clauses of the same section in the statute, and treating them as equivalent, when they are totally distinct. By an examination of the statute in connection with the count, we do not think the objection is well founded. The statute enacts, that "if any person shall erect, or cause to be erected, across any public road, a fence, bar, or other impediment, or fell a tree, or brush, or other obstacle on or across the same, and shall not remove it within twenty-four hours thereafter," &c., that such person shall be liable to indictment, &c. Clay's Digest, 508, § 7. The fourth count charges that Mrs. Thompson "a certain impediment, to wit: a large quantity of logs, sticks, brushwood and dirt, did erect and cause to be erected across a certain public road, situate," &c. Now, the impediment thus erected is clearly distinguishable from a fence or bar in the foregoing clause of the act, and also from the *felling* of a tree, brush or other obstacle, as subsequently enumerated; but it falls directly within the inhibition of erecting any "other impediment" than such as are particularly mentioned. A much more formidable impediment could be erected of logs, brushwood and dirt, than of rails in the form of a fence or bars, and we doubt not that such impediment was as much within the contemplation of the Legislature, in enacting the statute, as it certainly is within the mischief intended to be remedied.

Neither is the objection, that the indictment does not set out the width or grade of the road, well taken. It is sufficient that it is a public road. Whether it be of the first, second or third grade, can make no difference, since the statute makes tne obstructing of either alike indictable, and visits the offender with the same measure of punishment. We entertain no doubt as to the sufficiency of the indictment.

The main question, and the one principally relied on for a

reversal by the counsel for the plaintiff in error, arises out of a bill of exceptions, and may be thus stated: It appears that in August, 1849, the road charged to be obstructed was established by the Commissioners' Court of Talladega, and that the portion running over the land of the plaintiff in error had been cut out by order of the court. That at the Fall Term of the Circuit Court, 1849, these proceedings of the Commissioners' Court were quashed and set aside, at the instance of Mrs. Thompson, and that the supersedeas to the proceedings of the Commissioners' Court was by the Circuit Court rendered perpetual. That afterwards, viz: in May, 1850, another application was made for the establishment of the road, and the same was established by the Commissioners' Court, after a jury of review had passed upon it, at the August Term, 1850. In the order establishing it, and which particularly describes where it shall run, it is stated, after tracing the road to Mrs. Thompson's line, "thence with her line to a stake in the rear of W. B. McClellan's negro cabins, thence along the line of the road, as it was cut out under a former order of this court, through the lands of Mrs. Thompson, to a post oak, marked," &c. The road was laid off into sections, and overseers were appointed, and ordered to open the same according to law. It further appears, that after the order of August, 1849, but before that of August, 1850, Mrs. Thompson had extended her fencing with her lines crossing the route of the proposed road, uniting her fences on the side of the mountain in the form of an angle. That she thereby enclosed a pond useful for purposes of husbandry, and also the family grave yard. That in this enclosure she sowed in a small isolated patch of an acre and a half, some wheat, which was growing on it in February, 1851, when the overseer with his hands took down her fences where they crossed the road, and removed the logs, brush, &c., which had been placed across it. It was shown that this crop of wheat was sown after the order of August, 1850, had been passed. After the road had thus been opened, Mrs. Thompson rebuilt her fences across it, and obstructed it otherwise. It was insisted in the court below, and is here also contended, that, at the time the overseer opened this road through the enclosure of Mrs. Thompson, she had a growing crop within it, and that

consequently the act of the overseer was void, as being opposed to the statute, which declares that the road shall not be opened between the first of March and tenth of July in any year, nor "*through any enclosure whilst there is a crop growing in the same.*" The ruling of the circuit judge, as indicated by the charge given to the jury, was opposed to this view. The question is, whether, under the facts of the case, the plaintiff in error was justifiable in fencing up the road.

As to the effect of the judgment of the Circuit Court, in quashing the proceedings of the Commissioners' Court of August, 1849, and perpetuating the supersedeas, we need only remark, that it applies only to the proceedings then before the Circuit Court, and could have no effect upon an order subsequently made upon a new and distinct application.

Upon the main question, we are of opinion that, as Mrs. Thompson must be presumed to have had notice of the order of August, 1850, establishing this road, and designating the particular route over which it was to run, after permitting the order to pass for opening it, she could not render such order nugatory, and thwart the object of the statute, by sowing this small patch of wheat.

We need not consider the question whether the plaintiff in error, after the road has been established by a court of competent jurisdiction, and cut out by an officer of its appointment, can collaterally call in question the proceedings of the court, or of the overseer who has acted in obedience to its command. For, giving to this statute a reasonable construction, we feel constrained to hold that the growing crop, mentioned in the conclusion of the fourth section, does not embrace a crop planted or sowed *after* the order establishing the road. Such a construction as the one contended for by the counsel for the plaintiff in error would enable any person, over whose land a road was established, to thwart the action of the court in its attempt to provide, as contemplated by the statute, for the public convenience and necessity, by planting and having some description of crop always growing in his enclosure, as may well be done in this climate. Such construction would therefore be unreasonable, as it would frustrate the manifest object which the Legislature had in view.

Besides, it would seem to be opposed to the concluding

clause of the next succeeding section, which says, that the court in the order may appoint the time for cutting out the road. Now, it may happen that at the time the order is granted there is no growing crop, and a time is fixed for cutting out the road, yet before the time arrives the owner of some farm has his wheat, or his turnips, or some other crop growing, and before these cease to grow another crop succeeds, and so on *ad infinitum;* so that, notwithstanding the county has purchased and paid for the right of way, and a court of competent jurisdiction has established it, and ordered it to be cut out, a capricious individual would have itin his or her power to forestall and frustrate the whole proceeding.

If it be said the letter of the statute is opposed to this view, and that the restriction against opening the road through an enclosure, while there is a crop growing thereon, is general, we reply, that an interpetation should never be adopted which would defeat the purpose of the statute, if any other reasonable construction may be given to it, 9 Wheat. 381; and that the literal interpretation of an act is not always that which either reason or the law approves. The inartificial manner in which many of our statutes are framed, the inaptness of expressions frequently used, and the want of perspicuity and precision not unfrequently met with, often require the court to look less at the letter or words of the statute, than at the context, the subject-matter, the consequences and effects, and the reason and spirit of the law, in endeavoring to arrive at the will of the law giver. Stradling v. Morgan, 1 Plowd. 200; 2 ib. 463; 4 Litt. 377; and cases cited, 1 U. S. Dig. 484.

It results from what we have said, that there was no error in the charge which the court gave, and that the charges prayed for were properly refused.

In the progress of the trial below, the State offered the record of the proceedings had in the Commissioners' Court in August, 1849, establishing a road over the land of Mrs. Thompson, as before stated, which proceedings had been quashed in the Circuit Court. The bill of exceptions shows that these proceedings were offered and admitted, only to show that after the order was made, and while in full force, the defendant had extended her fence across said road, as the

evidence previously introduced showed, "so that the jury might judge of the motive which had influenced her in obstructing this road." We are wholly unable to perceive what connection Mrs. Thompson's violation of the law, or disregard of the order of the Commissioners' Court in 1849, has with her obstructing this road in 1851. If she committed an offence then, by enclosing her land, over which the road had been cut out, she was answerable for that by a distinct proceeding. If, by reason of the irregularity of the proceedings of 1849, she might well disregard them, and go on and erect her fence, then she is guilty of no wrong by so doing, and no inference prejudicial to her could properly have been drawn from it. So that this proof, for the purpose of explaining the motive with which the subsequent act was done, was irrelevant and inadmissible. We think the record of the quashed proceedings might properly have been read, to explain the subsequent order which refers to them, as designating the proposed route for the road through Mrs. Thompson's land, but the same was not read for that purpose.

It may, however, be argued, that no injury resulted to the plaintiff in error by the improper admission of this testimony. We have considered this point, and are not prepared to say that she could not by possibility have been prejudiced by its admission. It was calculated to impress upon the minds of the jury the belief that she was disregardful of the orders of the Commissioners' Court, and consequently was a proper subject to be made an example of.

For this error, let the judgment be reversed and the cause remanded.

WILLIAMS, TUCKER ET AL. *vs.* THE STATE.

1. The sureties on a forfeited recognizance cannot, by a demurrer to the *scire facias*, test the legal sufficiency of the indictment against their principal. A demurrer to the *scire facias* can reach no further than the recognizance on which the judgment *nisi* is founded.

ERROR to the Circuit Court of Macon.
Tried before the Hon. E. Pickens.

Moses Daniel was indicted in the Circuit Court of Barbour county, for "inveigling, stealing, carrying and enticing away" a negro slave. On his motion, the venue was changed to the county of Macon, and he entered into a recognizance, with plaintiffs in error as his sureties, to appear and answer the charge of negro stealing, before the Circuit Court of Macon. He did not appear, and a judgment *nisi* was entered up against him and his sureties. A writ of *sci. fa.* was issued, and returned "made known," as to the plaintiffs in error, who appeared and demurred to the *scire facias.* The demurrer was overruled by the court, and they then pleaded *nul tiel* record. The plea was found against them, and they prosecuted their writ of error to this court.

Moses Daniel was indicted by the name of Moses Daniels; he pleaded the variance in abatement, as a misnomer, but his plea is untried. The recognizance is in the name of Moses Daniel, and so is the writ of *scire facias.*

The overruling of the demurrer, and the judgment rendered by the Circuit Court, are here assigned for error.

P. T. Sayre, for plaintiff in error.

Moses Daniels is indicted for the larceny of a negro; a recognizance is given by plaintiffs in error, for the appearance of Moses Daniel. The recognizance was forfeited. *Sci. fa.* issues, reciting that Moses Daniel was bound to answer an indictment against him. *Nul tiel* record is pleaded, and judgment given for the State. Daniel and Daniels are not the same name.—Humphreys v. Whitten, 17 Ala. Rep. 30; so that the record does not show that the facts set out in the *sci. fa.* exist, and the judgment ought therefore to have been for the plaintiffs in error.

M. A. Baldwin, Attorney General, *contra:*

The want of an indictment against the party, in the court to which he is bound, is no excuse for not appearing. The court, and not the party, must judge of the necessity of his appearance, and the party is not legally discharged, except by an order of court.—State v. Sterrrett, 6 Halst. R. 124; State v. Cooper, 2 Blackf. 226; 11 Mod. Rep. 200, cited in Viner's Abv. 168; 2 Hawk. 173; 1 Chitty Cri. Law, 105;

Ellison v. State, 8 Ala. Rep. 273; Shreeve & Knapp v. State, 11 ib. 678; State v. Weaver, 18 Ala. Rep. 296.

LIGON, J.—This case is very fully covered by the decision of this court in the case of The State v. Weaver *et. al.*, 18 Ala. Rep. 293. It was there ruled, that the sufficiency of the indictment can not be brought in question upon a demurrer to the *scire facias* on a forfeited recognizance. The recognizors (except the accused) have no connection with the indictment, and the question of regularity or irregularity, in this respect, is wholly disconnected from their undertaking. They bind themselves that their principal shall appear and answer the charge against him, and if he fail to do so, the condition of their bond is broken, and they become liable for the penalty. A demurrer to the *scire facias* can reach no further than the recognizance on which the judgment *nisi* is founded, and in this case it is not pretended that there is error to be found in the proceedings on the recognizance, but the error assigned relates to the indictment alone.

The plea of *nul tiel* record is unsustained, and the judgment rendered on it by the court below is free from exception.

Let the judgment of the court below be affirmed.

LAWSON AND SWINNEY *vs.* THE STATE.

1. An indictment which charges that the defendants, a man and a woman, "did live together in fornication," is sufficient.
2. An indictment is good which purports to be found by "the grand jurors for the said State, sworn and charged to inquire for the said county," when the names of the State and proper county are stated in the margin.
3. In all cases, whether civil or criminal, involving a charge of illicit intercourse within a limited period, evidence of acts anterior to that period may be adduced in connection with, and in explanation of, acts of a similar character occurring within that period, although such former acts would be inadmissible as independent testimony, and, if treated as an offence, would be barred by the statute of limitations.
4. Acts of indecent familiarity within the limited period cannot be explained by proof of the subsequent illicit intercourse of the parties; but when such acts

of indecent familiarity have been explained by previous acts of illicit intercourse, then proof of the subsequent illicit intercourse becomes corroborative or cumulative evidence, and is admissible.

5. When a man and a woman are jointly indicted and tried for living together in fornication, the confessions of the woman are admissible evidence against herself.
6. But it is the duty of the court to caution the jury that such confessions can operate only against the party making them, and that the other defendant cannot be convicted, except upon evidence *aliunde* sufficient to establish his guilt.
7. The admission of the woman that her co-defendant was the father of a bastard child, of which she was delivered more than twelve months after the finding of the indictment, is admissible evidence against her, its relevancy being shown by connecting it with other acts occurring before and within the period covered by the indictment.
8. When evidence *prima facie* irrelevant is admitted against the objection of the opposite party, and the record affirmatively shows that its relevancy was made to appear from its connection with evidence subsequently introduced, the Appellate Court will not reverse.
9. The refusal of the male defendant to pay the physician for his professional services rendered during the confinement of the woman, and his declaration that the child was not his, are not admissible evidence for him, when unconnected with any conversation or admission offered by the State against him.
10. The fact of illicit connection between a man and a woman is one which, from its nature, can very rarely be directly proved, and must, in the great majority of cases, be inferred from circumstances, the weight and conclusiveness of which vary according to the situation and character of the parties, the habits of society, and other incidental circumstances.
11. A statement made by another person, or a conversation carried on in the presence and hearing of a party, to which he made no reply, cannot be received in evidence against him as an implied admission on his part of its truth, unless it was of such a character as would naturally call for a response from him, and he was in a situation in which he would probably have replied to it.
12. A conversation carried on in the presence of the woman, and in the room where she was lying, a few minutes after she had been delivered of a child, between her mother and the attending physician, as to the person to whom the latter should look for payment of his professional services, in which conversation she took no part, is not admissible evidence against her, as tending to show her acquiescence in the truth of their statements.

ERROR to the Circuit Court of Macon.

Tried before the Hon. E. Pickens.

The indictment against the plaintiffs in error was as follows, viz:

"THE STATE OF ALABAMA, } In the Circuit Court, at Spring
Macon county. } Term, 1849.

"The grand jurors for the said State, sworn and charged

to inquire for the said county, upon their oaths present, that John R. Lawson, a man, and Mary Swinney, a woman, both late of said county, on the first day of January, 1849, and continually from that day to the finding of this indictment, in the county aforesaid, did live together in fornication, against the peace and dignity of the State," &c.

The defendants demurred to the indictment, and their demurrer being overruled, they pleaded "not guilty, and the statute of limitations of one year." There was a verdict of "guilty" against both of the defendants. On the trial, a witness was introduced by the State, who testified that in 1848, and more than a year before the indictment was found, he had seen said Mary Swinney, in company with her mother, in the night, at the house of said Lawson, who was sick at the time, and who was shown to be an unmarried man, "it being expressly declared by the State that the foregoing evidence was intended to be connected with other evidence to be subsequently introduced." The court allowed the evidence to go to the jury, and each defendant objected separately and specifically to each portion of it, on the ground that each portion related to a time anterior to one year before the indictment was found, and anterior to the first of January, 1849. The court overruled their objections, and each defendant excepted.

The State proved by another witness, that defendant Mary was seen at Lawson's house early in the morning, about sunrise, during the year 1846, and frequently at other times during the year was seen on his premises; that in 1847 said Lawson came to the house of witness, and, on being asked to stay all night, refused, and inquired where Mrs. Swinney (the mother of defendant Mary) and her family were staying. Witness informed him that they were staying in his kitchen, and Lawson immediately went into the kitchen, and remained there all night.

The defendants also objected to each portion of this evidence on the same ground, but their objections were overruled, and they excepted.

The State further proved, by other witnesses, that defendant Mary was frequently seen at the house of Lawson, at one time early in the morning, during the fall of 1849 and in 1850; that she was seen sitting at the head of the table in his

house "dishing out coffee;" and that she frequently staid all night at his house. Each defendant objected to each divisible clause of the evidence thus offered, on the ground that it related to a time subsequent to the finding of the indictment, and was illegal and irrelevant. The court overruled their objections, and the defendants excepted.

The State also introduced one Dr. Mabson as a witness, and offered to prove by him that in the summer of 1850 he was at the house of Mrs. Swinney, when defendant Mary was delivered of a child; that in the room where said Mary was lying, and in her presence, (she being shown to be in a rational state,) and a few minutes after the child was born, a midwife, who was in the room, said something to Mrs. Swinney about her fee, when Mrs. Swinney told her she should be paid. Dr. Mabson then remarked to Mrs. Swinney, "What will I do for my fee?" Mrs. Swinney answered, "that he ought to be paid; that he deserved it; that he must not look to her for his fee, as she did not send for him; that she had sent to Mr. Lawson to send for a doctor." Witness further stated that defendant Mary made no remark on the occasion. The State expressly offered the foregoing testimony only as to defendant Mary, and announced that it was intended to connect it with other evidence to be subsequently offered. Each defendant objected to each portion of this evidence, on the ground last above stated, and defendant Lawson objected to it on the further ground that he was absent at the time. The evidence was admitted, and defendants excepted.

The State further proved by Dr. Mabson, that when the brother of defendant Mary (a small boy living with his mother) came after him, on the occasion above referred to, when said Mary was delivered of a child, he was riding a horse which belonged to defendant Lawson. This evidence also was admitted by the court, against the defendants' objection, and they excepted.

The defendants offered to prove by Dr. Mabson, on his cross examination, that he had afterwards applied to Lawson for his fee for delivering said Mary of the child, and that Lawson refused to pay it, and said that the child was not his. This the court refused to allow, and defendant Lawson excepted.

The State also proved that after the birth of said child. defendant Mary had confessed that it was Lawson's child. This confession was offered only as evidence against defendant Mary, and was so admitted by the court; and each defendant excepted to its admission. The State also proved that, after the birth of the child, the defendants were frequently seen riding together in a buggy; that at the last term of the court, when the case against them was called, they came into court arm in arm, and afterwards left town together in the same buggy. This evidence also each defendant objected to, and their objections being overruled, they excepted.

RICE & MORGAN, for plaintiffs in error.

1. When the only charge in an indictment is, that a man and woman "did live together in fornication," and the State places both the defendants on trial together, any testimony which is not admissible as to one of the defendants, cannot be admitted against the other. The State v. Jolley et al. 3 Dev. & Bat. 110; The State v. Welch, 26 Maine Rep. 30; 3 Chitty's Crim. Law 1141; Rex v. Sudbury et al. 1 Lord Raymond 485; Rex v. Kinnersley et al. 1 Strange 196; Rex v. Scott et al. 3 Burr. Rep. 1264; Palmer v. Severance, 10 Ala. 346. If the female's confessions are admitted as evidence against her, how can the court save the male defendant from the influence of such confessions?

2. Upon such trial of such indictment, the State is bound to prove the guilt of both defendants, and to secure the conviction of both, else no valid judgment can be entered against either. This of itself gives to each defendant such an interest in the acquittal of the other, as to authorize each to make any objection to any evidence affecting the result, which his co-defendant could make. If the testimony be admissible as to one only, it is only half admissible, and must therefore be rejected *in toto*. And although the man only be indicted, yet the same principles apply; because the offence is necessarily joint, and the guilt of two must be proved.

3. Although fornication may be inferred from collateral facts or circumstances satisfactorily proved, yet the only facts and circumstances which are admissible for that purpose must

be such as are "coincident with guilt, and seem naturally to exclude every other hypothesis." The State v. Crowley, 13 Ala. 175; Richardson v. Richardson, 4 Porter 467; Grant v. Cole, 8 Ala. 519; Duncan v. Littell, 2 Bibb 424; McLeod v. Wakley, 3 Car. & P. 311.

4. The talk or conversations of third persons are inadmissible to prove fornication. Belcher v. The State, 8 Humph. Rep. 63; Bradford v. Bush, 10 Ala. 389; Oden v. Stubblefield, 4 ib. 40; Anderson v. Hawkins, 1 Dev. Rep. 445.

5. The conversation between Mrs. Swinney, Dr. Mabson and the midwife was clearly inadmissible, even against defendant Mary. It occurred more than a year after the indictment was found; has no relevancy to the charge contained in the indictment; was not participated in by the defendant Mary; was of such a rude and offensive nature, as not to entitle it to any notice or reply from her, even if her situation at the time had not rendered it highly improbable that she would reply to it. No legitimate inference can be drawn from her "mere silence." Wheat v. Croom 7 Ala. 349; Watson v. Byers, 6 Ala. 393; Mattocks v. Layman, 16 Verm. 118; 2 En. Crown Cases 347; 1 Moody 347; 14 En. Com. Law Rep. 152; 22 ib. 329; 1 Smedes & M. 562; 14 Serg. & R. 388; 12 Met. 235.

6. Although, in such a case as this, the evidence is not necessarily confined within the time specified in the indictment, or within the twelve months before the finding of the indictment, yet proof of anterior acts cannot be admitted, until proof is first made of other acts of a like nature within that period. The State v. Crowley, 13 Ala. 174; Innerarity v. Byrne, 8 Porter 176; Mardis v. Shackleford, 4 Ala. 501. The first evidence offered by the State, and objected to by the defendants, is conceded to be *prima facie* irrelevant, and what acts of a similar nature, occurring "within the limited period," were offered to show its relevancy? This court has decided, that when evidence which is *prima facie* inadmissible is admitted, it is a sufficient cause of reversal; that the court itself must decide correctly as to the admissibility of evidence. Crenshaw v. Davenport, 6 Ala. 390; DeGraffenreid v. Thomas, 17 ib. 602; Abny v. Kingsland, 10 ib. 355.

It cannot be said that the error did no injury, and therefore

it is no ground for reversal. How can this court know that it did no injury? Why let the State make the first impression on the minds of the jury by illegal evidence? A criminal case is not one in which the Appellate Court ought to speculate, as to the probable effect of *any error* committed by the court below.

7. The birth of the child some fifteen months after the indictment was found, was not evidence that defendant Mary had had criminal intercourse with any man at or before the indictment was found; nor was it evidence that she had "lived in fornication" with any man at or before the indictment was found; nor was it evidence that she had "lived in fornication" with defendant Lawson at or before indictment found. The State v. Crowley, 13 Ala. 172; 1 Carr. & P. 22. In actions for slander, or malicious prosecution, or other action where the intention or motive of the party is a material ingredient of the cause of action, it is permissible to show subsequent acts and words, which naturally lead to the conclusion that the defendant had a bad intention or motive at or before the suit was brought. But in actions of trespass, or other action, or an indictment for fornication, where the intention of the defendants is immaterial, and does not form part of the offence, evidence of subsequent acts is never admissible. Newton v. Holford, 47 En. Com. Law Rep. 537. See also Clay's Digest 431, § 3, which shows that on second and third conviction of such offence, it becomes a felony. Where then is the reason or justice of admitting subsequent acts which may be a felony?

Again: if certain acts occurring within the period limited in the indictment had first been proved, and then evidence of subsequent acts had been offered to explain those acts, the defendants would have had the legal right to raise the question for the decision of the court, whether such acts were "of a like nature," or properly explainable by such evidence. Of this clear legal right they were deprived, by the course pursued on the part of the State.

8. The indictment is defective. It is not sufficient to allege that a man and woman "did live together in fornication." Moore v. Commonwealth, 6 Met. 243; Beasley v. The State, 18 Ala. 535; Archbold's Crim. Pl. 38; 1 Bouv. Law

Dic. 85, 585. It does not charge "one complicated offence consisting of several facts, but several offences jumbled together." Rex v. Roberts, 1 Show. Rep. 390. A paper purporting to be the act of "the grand jurors for said State" is not an indictment. An indictment is the act of "the grand jury for the body of" some named county. Clay's Digest 453 § 19; Middleton v. The State, 5 Porter 484.

M. A. Baldwin, Attorney General, for the State.

I. In every case of this sort, the fact is to be inferred from the circumstances. 2. Greenl. Ev. 31. And acts barred by the statute of limitations, as well as those which take place after the finding of the indictment, may be given in evidence, as explanatory of acts within the time alleged, for which the parties are indicted, as in insanity. 2 Greenl. Ev. 36; State v. Wallace, 9 N. H. 517; Com. v. Merriam, 14 Pick. 518; State v. Crowly, 13 Ala. Rep. 172; Loveden v. Loveden, 2 Hagg. Con. Rep. 463.

II. The proof in this case is the same, whether the issue arises in an indictment, a libel for a divorce, or an action on the case. 2 Greenl. on Ev. 31; Betts v. Betts, 1 Johns. Ch. Rep. 197; Burgess v. Burgess, 2 Hagg. 533; Mortimer v. Mortimer, ib. 543; State v. Morgan, 11 Ala. Rep. 291. And there is no difference in principle, as to proof by confession, in cases of this kind and any other. 2. Green. Ev. 34–35.

1. Nor does it make any difference, in a case *where the guilt of one involves the guilt of the other.* It is competent testimony to go to the jury, to have whatever weight it is entitled to, as against the party making the confession. In cases of conspiracy, judgment may be given *against one conspirator* before the trial of the other. Rex v. Kinnersley, 1 Str. 195. And one may be convicted after the other conspirator is dead. Rex v. Nichols, 2 Str. 1227; Rex v. Scott et al., 3 Burrows 1262. Suppose Mary, the defendant, had been tried alone, her confessions would have been good as against her, but not as to Lawson. Proof *aliunde* of her confessions would be necessary to establish his guilt; and if Lawson had been acquitted, the conviction of Mary Swinney would have been set aside, for it takes two to commit this crime; on the same principle that one cannot be convicted of a conspiracy, or two of a riot.

2. If the *confessions* of one cannot be given in evidence, as against himself, in a case of this kind, how can the *acts* of one be given in evidence, as against him in the same sort of a case? If the defendant, Mary, had been seen going to the house of defendant, Lawson, in the night, or been seen coming from Lawson's house early in the morning, this would have been a circumstance against her, and evidence *tending* to show her guilt. What would be the difference in proving by a witness who saw her going into, or coming out of the house of Lawson, and proving by a witness that she *confessed* that on a certain time she went into, or came out of the house of Lawson.

3. The *particeps criminis* in adultery is a good witness against the party indicted. If so, are not his confessions good against him when jointly indicted? 2 Greenl. Ev. 36; State v. Crowley, 13 Ala., Rep. 172.

4. If a single man and a married woman be indicted for adultery, before conviction for that offence one of the parties must be shown to be married, otherwise (the illicit intercourse being proved) the offence would be only fornication, a lesser grade of crime than adultery. State v. Hinton and Watson, 6 Ala. Rep. The confession of the woman that she was married (the illicit intercourse being proved) may then convict, not only her, but the man, of a higher degree of crime than if they were not proven. Cameron v. State, 14 Ala. Rep. 546.

5. The cases in 3 Dev. & Batt. 112, and 26 Maine Rep. 30, bear no analogy to this. It was not decided in those cases that, *as a general rule, evidence which is not admissible as to one is not admissible as to either, where the guilt of one involves the guilt of the other;* but simply that husband nor wife cannot be a witness for or against each other, or for or against any other person who is a party to the record, or in interest with such husband and wife, in any matter which arose while the marriage subsisted, upon the ground of the identity of interest which the law creates, and the confidence which it protects between husband and wife, and also on the ground of public policy.

III. Declarations made by a person in presence of, and against the party accused, and not denied by him, are evidence against him. Com. v. Call, 21 Pick. 522.

IV. The party accused is not allowed to give in evidence his own declaration after the crime committed for which he is indicted. State v. Oliver, 17 Ala. Rep. 595, and authority cited.

V. The indictment is good. In an indictment for adultery, it is not necessary to aver that either party is married, for it is a technical offence. State v. Hinton and Watson, 6 Ala. Rep. If not necessary to aver that the parties are married, one or both, in adultery, it is not necessary to aver that both are unmarried, in an indictment for fornication. See also case of State v. Sterne, at this term, for hawking and peddling.

An indictment commencing, "The Grand Jurors for the State of Alabama, upon their oath, present," &c., held good by this court. Morgan v. State, 19 Ala. Rep. 556, and authorities.

GOLDTHWAITE, J.—We think the court below did not err in overruling the demurrer to the indictment. If a single act of fornication was indictable, it might perhaps be necessary to allege the constituents which make up the offence, although even then, upon the reasoning of the case of State v. Hinton, 6 Ala. Rep. 365, it would be sufficient to charge the offence in the terms of this indictment. But entertaining some doubts as to the correctness of the reasoning in the case cited, we prefer to rest our decision on different grounds. The offence contemplated by the statute, Clay's Dig. 431, § 3, was not a single act, but the living together in fornication; and the facts which enter into the composition of this offence are necessarily so complicated, that it is impossible to state them, so that the legal conclusion of guilt will result with certainty and precision, and for this reason it is unnnecessary to allege them. A similar rule prevails, and for the same reason, in an indictment for keeping a common bawdy house; in which the statement of the character of the house, in general terms, is sufficient, without alleging the particular constituents which make up a house of that description.—1 Chitty's Cri. Law, 141. So also, an indictment charging the defendant with soliciting a servant to rob his master was held good, without stating the means of solicitation—Rex v. Higgins, 2 East, 4; and in the case of

Rex v. Fuller, 1 B. & P. 180, it was held, that the charge of an endeavor to incite a soldier to mutiny in general terms, although a felony, was sufficient. The same principle was also recognized by this court, in Sterne v. The State, decided at the present term, in which it was held, that where the offence was complicated, consisting of a repetition of acts, or where it was continuous in its character, not implying a single act or any given number of acts, the use of the general term was sufficient.

Neither is there any force in the objection, that the indictment purports on its face to be found by the grand jurors for the State, sworn and charged for Macon county.—Morgan v. The State, 19 Ala. Rep. 556.

The other questions involve the correctness of the admissibility of the evidence set out in the bill of exceptions, every divisible portion of which was objected to. The greater portion of this evidence related to acts occurring more than twelve months before, or at some period subsequent to the finding of the indictment; and assuming for the present that such facts conduced to establish the criminal intercourse of the defendants below, at the time to which they referred, the question is presented with reference to its admissibility in one aspect only, and that is, as to the time within which the evidence of acts of this character is to be confined. We entertain no doubt that in all cases, whether civil or criminal, involving a charge of illicit intercourse within a limited period, that evidence of acts anterior to such period may be adduced, in explanation of acts of a similar character within that period; although such former acts, if treated as an offence, would be barred by the Statute of Limitations.—2 Greenl. Ev. 36. Evidence of this character would not, however, be admissible as independent testimony, and if so offered should be excluded, but should be received when proposed in connection with, or subsequently to the introduction of evidence tending to establish an improper intercourse between the parties during the period to which the charge is confined, or in the present case to the time covered by the indictment.

As to the admissibility of evidence, tending to show the criminal intercourse of the parties at a period subsequent to

the indictment, there is more difficulty, and after a careful examination, we have been unable to find a case in which this point has been directly decided. The proposition, as a general rule, that acts of indecent familiarity may be explained by proof of the subsequent adultery of the parties, we should doubt, and we think we can see valid objections against it; but that subsequent acts of criminal intercourse can, under no circumstances, be received in explanation of such familiarities, is, we think, equally erroneous. When we concede the correctness of the rule, that previous acts may explain subsequent familiarities, it follows, that what is but an inference in the mind of the jury, created by the evidence of improper familiarities, explained by the fact of prior intercourse, may be corroborated by proof of subsequent illicit connection, which then becomes confirmatory or cumulative evidence. It will be observed, that upon the principle on which we have placed evidence of this character, it is *prima facie* irrelevant, and that when offered, its relevancy should be shown by its connection with acts already in evidence, or its proposal with facts subsequently to be established. There is also another principle upon which evidence of this character may be received in cases like the present. The fact to be established by the evidence is, that the parties lived together in a certain condition; and if this particular condition of life was proved to exist, both anterior and subsequent to the time alleged in, or covered by the indictment, an inference might often be correctly drawn as to the existence of this condition during the intermediate period. We would not be understood to say, that this inference would exist in every supposable case in which such proof could be made; in some instances, the two periods, at which the particular condition was proved to exist, might be so far apart as to afford no reasonable inference as to the intermediate time, and in that case the evidence would be inadmissible. In every case also, much would depend upon the character of the condition; but when the intermediate period was not so long as to be inconsistent with the nature of the condition proved, or when such evidence is offered in explanation of other facts already established, indicative of such condition, it is then relevant, and may in many cases be conclusive. Having stated the

conclusions we have attained in relation to acts outside of the period covered by the indictment, in the aspect in which we have considered it, it follows that the objections to its admission, on the ground that it referred to acts occurring more than twelve months before, or at any given period after the indictment was found, cannot be sustained.

It is, however, urged, that the admissions of one of the defendants, if admissible in all other respects, should have been rejected for reasons peculiar to the nature of the offence charged; that on the trial of an offence which cannot, from its constitution, be committed by one person, and where all who are charged with its commission are tried together, that any evidence which tends to establish the guilt of one, and one only, cannot be received. We have examined with some care, the authorities which have been cited in support of this proposition, but do not find that they sustain it. The case of the State v. Jolley & Whitley, 3 Dev. & B. 224, was an indictment of the same character as in this case; and the defendants being tried together, the husband of the female defendant, who had been divorced, was admitted against the objection of the defendants, to give evidence of their adulterous intercourse during the marriage. This evidence was held to be improperly admitted; and Judge Gaston, in delivering the opinion, intimates, that had the male defendant been tried alone, the evidence of the husband as to the same facts, against him would have been inadmissible, (not by reason of the joint nature of the offence, but) because the prohibition of husband and wife to testify against each other applied, not only when the testimony tended to convict, but when it tended to criminate or degrade. The case of The State v. Welch, 26 Maine R. 30, turned upon the same principle, and the husband was held an incompetent witness, simply upon considerations of policy, resting on the marriage relation. To the contrary of the position taken for the plaintiffs in error, we find that in the case of joint offences, where more than one defendant is on trial, it is the well settled practice to admit the confessions of one party against himself—the court cautioning the jury, that they are to operate against such party only, and that the other defendants cannot be convicted, except upon evidence *aliunde*, sufficient to estab-

lish their guilt. It follows, that the objection to the admissions on this ground is untenable.

The admission of the female defendant below, that Lawson was the father of the child of which she was delivered in the summer of 1850, tended to prove illicit intercourse between herself and Lawson at a time subsequent to the finding of the indictment, and was, under the rule we have established, admissible, if offered under circumstances which rendered its relevancy apparent to the court. Conceding, however, that it was not so offered, that its relevancy did not appear at the time it was proposed, yet its relevancy does appear from the facts shown by the record to have been subsequently offered in evidence.

In this aspect of the case the question of practice is raised, as to the effect of admitting evidence *prima facie* irrelevant, which is received against the objection of the opposite party, and without its relevancy being in any way shown to the court at the time it is offered. All the authorities agree, that in such case it is the better course for the court to reject it. Van Buren v. Wills, 19 Wen. 203; Weidler v. The Farmers' Bank of Lancaster, 11 S. & R. 324; Rex v. Hursey, 6 C. & P. 81; Davis v. Calvert, 5 Gill & John. 269, 304. But it is equally clear, upon the same authorities, that while the court may reject it in the first instance, it is not bound to do so, but may let it in, and repudiate it, if, after all is heard, it is still irrelevant.

It follows, that if it appears affirmatively from the record, that the evidence objected to became relevant by its connection with any other testimony subsequently offered, the court committed no error in its admission, or at least not such a one as the party objecting could avail himself of in an appellate court. We have considered the last question with reference to one portion of the testimony only, but an examination of the record will show, that the same principles are applicable to other portions.

The evidence offered by the defendant Lawson, of his refusal to pay for the professional services of the physician, rendered during the confinement of the other defendant, with his statement that the child was not his, not being connected with any conversation or admission offered by the State,

was properly rejected. To have allowed it would have been permitting the defendant to make evidence for himself.

Another objection urged against a large portion of the testimony is, that it did not tend to establish any of the ingredients entering into the consummation of the offence charged, without regard to time; that it tended neither to establish the living together of the parties, nor their illicit intercourse at any period. Upon this head it may be remarked, that the fact of illicit connection is one which from its nature can very rarely be directly proved, and must in the great majority of cases be inferred from circumstances, the weight and conclusiveness of which vary, according to the situation and character of the parties, the habits of society, and other incidental circumstances. Facts apparently trivial and innocent in themselves, sometimes derive importance from their connection and combination with other facts. That the parties were frequently seen riding together in a buggy would, as an isolated and independent fact, prove nothing; but the criminal intercourse between the parties once established, their continued intimacy, as denoted by acts of this character, might be entitled to much weight, as determining upon the question as to the continuance of such intercourse. The intimate association of a man with a female of known impurity is, of itself, a circumstance of some significance; and in all cases of this character, whether civil or criminal, the legal rule follows the rational interpretation. Green. Ev.

The evidence with which the court has had the most difficulty, in arriving at what it deems a correct conclusion in this view, is, the evidence first offered on the part of the State, showing the presence of the female defendant at the house of Lawson, in the night time, in company with her mother, in the year 1848, and the conversation proved by the witness Mabson, which occurred in the presence of the defendant Swinney, against whom only it was offered. The fact that an unmarried woman is seen in the night time at the house of a single man, who is sick at the time, in company with her mother, it is true, by itself and disconnected from every other fact, proves nothing, and it would be as unjust as uncharitable from that circumstance alone to draw any deduction unfavorable to the virtue of the female. But this evi-

dence was not offered by itself, and as an independent fact; it was proposed to be connected with other testimony subsequently to be offered; and the record informs us that in 1847, circumstances which it is unnecessary here to detail with particularity, were proved, tending to show an act of illicit connection between them at that time in Chambers county: that in 1846 the defendant Swinney was seen alone at Lawson's house, at an early hour in the morning, and that from 1845 to 1851 she was frequently seen going to and from his house, and during the same period they were frequently seen riding in a buggy together. We are of opinion that, in connection with this evidence, the testimony referred to became relevant. If the jury believed that the defendants were criminally intimate in 1847, the fact that the guilty female was seen at the house of her paramour in the night time, although he was sick, and she was accompanied by her mother, is a fact tending to show that their intimacy still continued, and might properly go to the jury, to be estimated by them.

The conversation which was detailed by the witness Mabson we regard as inadmissible. It could only be received as an implied admission against the female defendant, on the ground that by her silence she assented to the correctness of the conclusion, that her co-defendant was the proper person for the physician to look to for the payment of his professional services, for attention during her confinement. The rule laid down by all elementary writers, as the result of the adjudged cases, in relation to evidence of this character, is, that it is to be received with the utmost caution, and never should be received at all, unless the statement is of a character which naturally calls for a reply, and the party to be affected by it is in a situation in which he would probably respond to it. 1 Green. Ev.; Commonwealth v. Kinney, 12 Met. 235. Without considering whether the conversation was such as naturally to call for a response from her, we all concur, that her situation, as disclosed by the evidence, was such at the moment as to render it at least highly improbable that she would make any response. This being the case, under the influence of the rule above laid down, it should not have been received.

In relation to the other portions of the testimony, we are unable to perceive any error in their admission. The attention of the female to the ordinary household duties of Lawson, the open and public intimacy of an unmarried man with a woman, who had given the strongest proof of her want of chastitity by the birth of an illegitimate child, were proper to go to the jury, to show the character of their intercourse, at a time which, although after the finding of the indictment, might, in connection with the other facts establishing their intimacy at an antecedent period, throw some light upon the character of their intercourse during the intermediate time.

For the error, however, in the admission of the evidence of the witness Mabson, the case must be reversed, and the cause remanded.

McDADE *vs.* THE STATE.

1. When the time of the commission of the offence charged is averred in an indictment under a *videlicet*, the prosecutor is not held to proof of it as laid; but he may prove that the offence was committed at any time before the finding of the indictment within the period prescribed as a bar.

ERROR to the Circuit Court of Montgomery.
Tried before the Hon Geo. Goldthwaite.

N. HARRIS, for plaintiff in error.

The rules of evidence in civil and criminal cases are the same; 1 Greenl. Ev. 82. In a declaration in trespass, when the trespasses are laid to have been committed between two periods of time, evidence is not admissible to prove a trespass committed without that period. Gould's Pleading 106, and cases cited in note.

M. A. BALDWIN, Attorney General, for the State.

1. The necessity of averring any time in an indictment of the commission of the offence, except when time enters into the character of crime, has been regarded as questionable, by

the Supreme Court of New York and of this State. It informs the party of nothing beneficial to his defence. People v. Santvoord, 9 Cowen 660; State v. Lapsly, 7 Por. 528.

2. There is one class of cases where we have high authority that it is not necessary to charge any time, and that is, where the offence, like the case at bar, consists in acts of omission. 2 Hawk. P. C., 25 ch., § 79: 1 Chitty Cr. Law 217.

3. But although it may be necessary, in all offences, to aver some time, yet there is no rule of law better established than this, that it is not necessary to prove the time as charged. 2 Hawk. P. C., Ch. 46, § 169; 1 Chitty Cr. L. 224; Roscoe Cr. Ev. 109; 3 Pick. 29; The State v. Sam, 2 Dev. 567.

4. Does the fact, that the time, as in this case, being laid under a *videlicet* or *scilicet* alter the rule? The general rule seems to be, that when time *is not* material, and is charged under a *videlicet* or *scilicet*, the pleader is not concluded by it. 1 Chitty Pl. 318; 1 Chitty Cr. Law 226; 3 Saunders 291, (note) top page 614; Paine, Judge, &c. v. Fox, 16 Mass. 133; Pharr and Beck v. Bachelor, 3 Ala. Rep. 244; Carlisle v. Davis, 9 ib. 860.

CHILTON, J.—The plaintiff in error was indicted as an overseer of a public road, for failing to keep the causeways and bridges, within his precinct, in good repair, but suffering them to remain uncleaned and out of repair for the space of ten days at one time, "between the time of his appointment and that period when it was to cease, to-wit: between the tenth day of November, 1850, and the tenth day of December, 1850, without being hindered by high water, bad weather, or other sufficient cause," &c.

The general rule requires the pleader to state some time when the offence was committed, within the period prescribed as a bar to the prosecution; but it is too well settled now to be questioned, that where the time is averred under a *videlicet*, the prosecutor is not held to proof of it *as laid*, but may prove that the offence was committed at any time before the finding of the indictment, and within the period prescribed as a bar. 1 Chit. Cr. Law 226; Roscoe Cr. Ev. 109; see also as to the office of the *videlicet*, Pharr et al. v.

Bachelor, 3 Ala. Rep. 244; Carlisle v. Davis, 9 ib. 860; Crawford v. Canfield, 6 Ala. Rep. 153.

Let the judgment be affirmed.

FRANCOIS *vs.* THE STATE.

1. An indictment under the eighth section of the fourth chapter of the Penal Code, (Clay's Digest 435, § 8,) which charges the defendant with selling "*to a certain slave, whose name is to the jurors unknown,*" is fatally defective, on demurrer, for uncertainty.
2. As a general rule, when an indictment is defective on demurrer, advantage may also be taken of the defect on motion in arrest of judgment.

ERROR to the City Court of Mobile.

Tried before the Hon. Alex. McKinstry.

PERCY WALKER and REQUIER, for plaintiff in error.

The indictment is clearly defective in not averring the name of the slave, or in some other manner, *designating the person*, so that the *particular slave* traded with could be identified. Without this, the defendant could not be apprised of the particular charge he was called on to answer.

The necessity of this degree of certainty is laid down in all the text books, and in various adjudged cases. See Archbold Cr. Pl. 42–37; 2 Term Rep. 581; 2 Str. 1127; Show. 289; 1 Chitty 168, 172, 211, 215, 227, 229; 1 R. & R. 489.

The act of 1850, page 51 of pamphlet acts, does not do away with the necessity of the pleader adhering to the above general rule.

True, that act declares it to be unnecessary, in such cases as this, to aver or prove the name of the owner, &c., of the slave; but it does not follow that the pleader need not, by proper averments, indicate the slave trafficked with, for this is essential to the protection of the defendant.

M. A. BALDWIN, Attorney General, for the State.

1. The name of the owner need not be averred. See acts 1850, page 49.

2. The manner of alleging a want of consent of the owner of the slave, is good under the act of 1850. The State v. Lindsay, 19 Ala. 560.

3. There are some cases in which the name of third persons cannot be ascertained, and in which it is sufficient to state "a certain person to the jurors aforesaid unknown." 1 Chitty Cr. Law 212; 2 Hawk. ch. 25, § 71.

4. If the name of the slave, to whom property was sold, is unkown, it is sufficient so to aver it in the indictment. Noonan v. The State, 1 S. & M. 574; Com. v. House, 8 Leigh. 755; The State v. Nutwell, 1 Gill. 54.

GOLDTHWAITE, J.—The section of the penal law under which the defendant was indicted is in these words: "Every person who shall buy, sell, or receive from any slave any commodity, of any kind or description, without the leave or consent of the master, owner, or overseer of such slave, verbally or in writing, expressing the articles permitted to be sold or bartered, first obtained, shall, on conviction," &c. Clay's Dig. The indictment charges the defendant with selling "*to a slave whose name is to the jurors unknown*, one gill of whisky, without the leave or consent," &c.; and the main question raised in this court is, as to the sufficiency of this indictment. The rule is well settled, not only that the facts and circumstances which make up the offence must be stated in the indictment, but that they must be stated with such certainty and precision, that the defendant may be enabled to judge whether they constitute an indictable offence or not, that he may demur or plead to the indictment accordingly; in order that he may prepare his defence, may plead a former conviction or acquittal, and that there may be no doubt as to the judgment to be given. Arch. Crim. Pl. 40. The question, then, is, are the facts which constitute the offence stated in this indictment with such a degree of certainty, as to enable the defendant to prepare his defence?

Assuming that the indictment is good, we apprehend it would be competent for the prosecution to identify the slave by proving his name, the name of his owner, or in any

other mode; and if this was done, the defendant would then be obliged to apply his defence to the specific case made out by the prosecution; he would be compelled to prove that he had the consent of the master, owner, or overseer, to trade with the particular slave with whom the evidence had connected the act charged; and to do this, he must necessarily be prepared at the trial to defend every case which can be embraced in the general act alleged in the indictment. It was to avoid this difficulty, that the rule which we have referred to was adopted, the effect of which was, to require the pleader so to frame the indictment as to present the particular case. The cases cited by the counsel for the plantiff in error are conclusive, in showing the application of this rule to cases similar to the one under consideration.

We would not, however, be understood as deciding that it was absolutely necessary to describe the slave, in indictments for this species of offence, by his name. That is but one mode of description, and any other which would afford to the defendant information, as to the particular slave to which the charge referred, we are inclined to think would be sufficient; neither do we deny that in some cases, where the means with which, or the person on, or by whom, an offence is committed, are unknown to the jurors, it may not be so charged in the indictment. If the trading with a slave was an offence, without any other constituent, we see no reason why the indictment might not allege his name as unknown to the jurors, if such was the fact, without in the slightest legree impairing the ability of the accused to defend; and we can suppose many cases, in which this can be done without infringing on the rule which we have referred to, and on which our decision is based. When, however, this rule would be invaded, and the effect of alleging a constituent of the offence in this form would be to create such a degree of uncertainty in the indictment, as materially to abridge the ability of the defendant to prepare his defence, we hold that it could not be so charged.

It is urged, however, on the part of the State, that indictments for trading with slaves are exempted from the influence of this rule, by the operation of the act of 7th February, 1850. That act declares, that on the trial of any person in-

dicted for trading with a slave, it shall not be necessary, in order to convict, for the State to aver, or prove, who was the master, owner, or overseer of such slave, or that the leave and consent was not given, &c. (Acts, 1849–50, p. 51); and our opinion is, that the object of the Legislature, by this enactment, was merely to dispense with an averment, which was frequently difficult to prove, and to cast the *onus* of making this proof, when essential to the defence, upon the defendant, instead of requiring it to be established by the State, as it must have been under the rules of pleading, if alleged in the indictment; for it then would have become matter of description. The intent of the law maker was, not to deprive the accused of the power of defence, by rendering unnecessary every averment which could inform him of the subject matter to which the evidence against him was intended to apply, but simply to dispense with a particular allegation, which, by its difficulty of proof, too often led to the escape of the offender.

These views sufficiently indicate our opinion, that the indictment is defective; and as the objection would have been fatal on *demurrer,* under the general rule it must prevail on a motion in arrest of judgment. The other questions raised on the record it is unnecessary to decide, as no conviction can be had on the present indictment. The judgment must be reversed, and the indictment quashed; but the sheriff of Mobile county must retain the defendant in custody, until he give sufficient bail, in the sum of two hundred dollars, for his appearance at the next term of the City Court of Mobile, to answer a new indictment for the offence.

MILLS *vs.* THE STATE.

1. A neighborhood road is a "public place" within the statute against gaming, it being shown that the playing took place near an assemblage of persons, some of whom were looking on at the playing, and others passing about at the time.
2. The term "highway," as used in the statute against gaming, means a public

road, one dedicated to, and kept up by the public, as contra-distniguished from a private way or a neighborhood road.

ERROR to the Circuit Court of Marion.

Tried before the Hon. Turner Reavis.

W. S. EARNEST, for plaintiff in error:

1. The dwelling house of Whitehead would not have been a public place under the statute. The place where the playing took place was on his premises, and as much under his control as his own house, and the playing was with his permission. A private lane leading to a man's house is not a public place, especially at night. The case of The State v. Campbell, 18 Ala. Rep. 369, does not cover this case. The case of Clarke v. The State, 12 Ala. Rep. 492, is more in point.

2. A private house can only become obnoxious to our statute, by being resorted to for the purpose of gaming.

M. A. BALDWIN, Attorney General, for the State:

1. Where the facts are clear and undisputed, the court may charge directly upon them, without hypothesis. 13 Ala. Rep. 713; 16 ib. 318.

2. The place where the playing took place was made public, by the assemblage of persons who came to assist Whitehead. This is a much stronger case for the State than Campbell's case, in 17 Ala. Rep. 369.

3. The place was public for another reason. It was a neighborhood road. Any place to, or along which the public have a right to go, is a public place. Clarke v. State, 12 Ala. Rep. 492; Roquemore v. The State, 19 ib. 528. This case does not fall within the rule laid down in Bush's case, 18 Ala. Rep. 415, for the playing, though in a neighborhood road, was not in a highway.

CHILTON, J.—This was an indictment against the defendant, Mills, for gaming, playing cards at "a public place."

The court charged the jury that, if they believed the evidence, they must find the defendant guilty. This renders it necessary that we should set out the evidence, which is shown by a bill of exceptions as follows:

Several neighbors were invited to assist one Whitehead in shucking his corn. After they had finished, the defendant and one Anthony made up a fire outside of the yard, but within a few steps of the fence, in a lane leading to the house, and there engaged in playing cards. It appears that some little boys were playing at marbles by the same light, while four or five persons were standing around, and some passing about. Whitehead, who was introduced by the defendant, testified that he refused to let them play in the house, but gave his permission to let the defendant play where he did; that said lane was a neighborhood road leading to his house, and that the playing took place some time in the night.

The question in the court below, and that which is made here, as involving the sufficiency of this evidence, conceding it to be true, is, does it show that the playing was at such a public place as is contemplated by the statute?

The statute inhibits the playing "at any tavern, inn, store house for retailing spirituous liquors, or house or place where spirituous liquors are retailed or given away, or any public house or highway, or any other public place, or in any out house where people resort," &c.

We do not entertain a doubt that this playing was at a public place, and that the object of the statute would be frustrated, if gaming could be thus exhibited upon a neighborhood road, near the assemblage of a number of persons, and where they may witness it at pleasure.

The more plausible objection to a conviction is, that the road is a highway as contemplated in the statute, which would make a variance between the proof and the indictment; but we think by the term "highway," as used in the statute, the Legislature meant a public road, that is, a road dedicated to, and kept up by the public, as contra-distinguished from private ways or neighborhood roads, which are not so kept up.

The case of Clarke v. The State, 12 Ala. Rep., 492, is not opposed to the view here taken. There the playing was in a shop, closed and made private by the exclusion of the public. Here, upon a road which the neighbors were accustomed to travel, and at a time when they were passing.

Let the judgment be affirmed.

Ex Parte CAMPBELL.

1. Where a prisoner moves the Circuit Court for bail, and the court proceeds to examine fully the facts and circumstances attending the commission of the alleged offence, it is not error to refuse to permit the prisoner, after having submitted all the evidence, to withdraw his motion, since the State, as well as the prisoner, is interested in it. It is the duty of the court to proceed with the case, and either bail the prisoner, and thereby rid the State of the expense of his custody, or remand him, as the facts may require.
2. When an application for *habeas corpus* is made, to obtain the petitioner's discharge on bail, on account of a continuance of his case by the State upon the unsworn statement of the prosecutor, if the statement is reduced to writing and sworn to at the time the application it is made, is an answer to the application, and justifies the court in refusing the writ.
3. Where the record of the court shows that the facts and circumstances, attending the commission of the offence with which a prisoner is charged, have been fully inquired into, on an application by the prisoner for bail, the court, although not bound to bound to do so, may well decline to hear another application based on the same facts.
4. Although the writ of *habeas corpus* is a writ of right, yet the courts will not grant it, unless the party applying for it shows such a state of facts as entitles him to relief.
5. Notwithstanding a judgment refusing a discharge, upon an application for bail, does not conclude the party from again applying, yet it is within the sound discretion of the court, after having fully examined the facts and circumstances on the previous application, whether it will retry them upon a renewed application, or repose upon its former judgment; and this discretion will not be controlled by *mandamus*.

A. J. Walker, an attorney of this court, submitted a motion in behalf of James H. Campbell, accompanied by the record of the proceedings had in the Circuit Court of Cherokee county, for a writ of *habeas corpus*, for the purpose of obtaining bail for the prisoner, who is confined, as the record discloses, upon a charge of the murder of one Martha Garett.

It appears that after the indictment was found, and the prisoner had been arrested, and was present in court, the solicitor continued the cause upon the unsworn statement of the prosecutor, which was received by the court, the prisoner making no objection to thus receiving it. (It was, however, consented by the solicitors engaged in the cause in this court, that the statement might be considered as taken in writing, and sworn to by the prosecutor.)

The prisoner then moved for bail, and thereupon the court proceeded to examine the witnesses on the part of the State, as well as those on behalf of the defendant, touching the guilt or innocence of the said defendant; and after hearing all the evidence on both sides, and after due consideration, it was adjudged by the court that the defendant was not entitled to bail. It appears that after all the evidence had been submitted to the Circuit Judge, and he had adjourned for the day, before the court convened the next morning the judge had announced to the counsel for the prisoner his opinion, that the facts of the case did not entitle the prisoner to bail. The counsel, as soon as the minutes were read next morning, and before the judge had delivered his opinion in the cause, moved to withdraw his motion, which being opposed by the solicitor on the part of the State, the judge refused leave to withdraw, and went on to deny the bail.

On the last day of the term of the court, the prisoner renewed his application for bail, as matter of right, upon the ground that the State had continued the cause upon the unsworn statement of the prosecutor. This motion was also overruled by the court.

At the next term of the court, the prisoner renewed his motion for bail, and desired the court to re-examine the facts and circumstances of his case, so as to determine whether they did not entitle him to this privilege; but refused to say that he expected to offer any other testimony, than that which had been previously passed upon by the court. The court, thereupon, declined to hear this motion.

It was consented between Mr. Walker, on behalf of the prisoner, and the Attorney General, that a motion for a *mandamus*, to require the judge to hear the application last refused, should be considered as made, and both motions were argued together, by consent.

Mr. Walker, for the prisoner.

1. There being no other legal remedy, *mandamus* is the appropriate one. As far as the refusal of the presiding judge at the fall term, 1851, to hear the application for a discharge upon bail, is concerned, a petition to this court for a *habeas corpus* is not the proper remedy, because it is necessary

to show in the petition for *habeas corpus*, that the accused was entitled by the *case made before the* inferior tribunal, to the relief which he sought. This could not be done, because the court refused to permit any case to be made before it, and in effect repudiated all jurisdiction over it.—Croom & May, *ex parte*, 19 Ala. Rep. 561; 17 ib. 530; 13 ib. 320; 13 ib. 805.

2. The calling upon the counsel to state whether they expected to make proof, additional to that adduced on the former application, is totally indefensible. The jurisdiction of a court can not be made to rest upon the basis of a verbal declaration at the bar, that additional proof will, or will not be adduced. To make the right of an accused individual to an examination into the "facts and circumstances" of his case, with a view to his discharge on bail, depend upon such declarations, imposes upon the judge the duty of determining, without hearing it, the weight and credibility of proof, and of guessing whether it will or will not be contradicted.

3. The decision of the prior court at spring term, 1851, that the case of the accused was not bailable, was not conclusive upon, and did not estop the subsequent court.—8 Ala. Rep. 424; 6 John. 426–7; 2 Southard, 555; 2 Yeates, 539.

4. If the decision of a court refusing to discharge upon bail be a conclusive judgment, precluding the jurisdiction of other courts upon the same question, it follows that any other adjudication on the subject of bail must be equally conclusive, and it would be incompetent for a subsequent court to increase or reduce the amount of a recognizance or bail bond, or to decide that the securities received by the former court were insufficient, and that the accused should give additional security.

5. If the decision of the first judge were not conclusive of the rights of the accused, the judge last acting on the subject could not make that decision the exclusive basis of his determination. The doing so substitutes the judgment of another for that of the person whom the law calls upon to decide. If the decision of the first judge be entitled to consideration, because the application for bail is addressed to the discretionary power of the court, then that decison should be regarded in connection with the evidence, as a *persuasive* argument; but if the discretion of the judge is controlled alone

by the former decision, it makes the liberty of the accused depend upon a *guess*, and not upon discretion.

6. Every person has the right to apply for *habeas corpus*, and it is the *duty* of the officer to whom application is made, to issue it; and it is also the *duty* of the officer before whom the writ is returned, to inquire into the facts and circumstances of the case.—Clay's Dig. 462, § 4; ib. 469, § 40.

7. If a decision *refusing* to discharge upon bail be conclusive,—a decision discharging upon *habeas corpus* must be conclusive. The legislature did not regard a discharge upon *habeas corpus* as conclusive, as is shown by the enactment of a law guarding against the re-imprisonment of one discharged on *habeas corpus*, except in a certain contingency. It could not have been the intention of the legislature to make a decision against the accused conclusive, when they did not regard a decision in his favor as conclusive.—Clay's Dig. 469, § 41.

8. Campbell had a right to withdraw his application for discharge upon bail, at any time before the decision was announced, and the court could not deprive him of that right. The application put the jurisdiction of the court in motion, and the application being withdrawn, the jurisdiction must cease. The knowledge of the judge, acquired out of the court house, *extra judicially*, could not be made the basis of *judicial* action by which the rights of the accused were materially affected. The only medium through which a court can ascertain the facts is sworn testimony, and no judicial action can be predicated upon the knowledge of a fact, which the individual happening to preside as a judge may have.—9 Watts & S. 153; 8 B. Monroe, 285; 8 ib. 225.

9. It was not the design of the legislature to admit the making the affidavit accounting for the absence of the witness, whose non-attendance causes the State to continue, to be made *after the continuance*. The effect of construing the statute, as is done in *ex parte* Chaney, *supra*, is to substitute the judgment of the officer, before whom the *habeas corpus* is returned, for the judgment of the court continuing the cause. The accused is entitled to have the affidavit passed upon by the court which continues the cause, and it is indefensible that the question, whether the affidavit accounts satisfactorily

for the absence of the witness, should be referred to another. One design of the statute was, to protect the accused from improper continuances on the part of the State, and when it is decided that the affidavit may be made after the continuance, the statute ceases to afford that protection, and only guards the liberty of the citizen.

M. A. BALDWIN, Attorney General; with whom was,
L. E. PARSONS, *contra:*

Per curiam.—We are of opinion that the Circuit Judge might well refuse leave to withdraw the motion for bail, having fully examined all the facts and circumstances of the case. It was a question in which the State, as well as the prisoner, was interested, and although the inquiry was begun upon the application of the prisoner, the State was in effect the plaintiff party, and it was the duty of the judge, having fully examined into all the facts and circumstances of the case, to proceed and admit the prisoner to bail, thus ridding the State of the expense of his custody, or remand him to prison, denying bail, as the facts and circumstances required.

We are further of opinion that both these motions must be denied. The first, which is for a *habeas corpus*, upon the ground that the affidavit upon which the continuance was granted, has been supplied by the argreement of counsel, and this, under the previous decision of this court in *ex parte* Chaney, 8 Ala. Rep. 424, deprives the prisoner of the right to bail, growing out of a continuance for want of such written affidavit. The second motion, which is for a *mandamus*, cannot be allowed; because the court, having previously examined fully into all the facts and circumstances of the case, was not bound to re-investigate the facts and circumstances, but might well repose on its previous decision made upon such full investigation. We will not say, the former adjudication was conclusive upon the party's right to bail, as arising out of the facts. On the contrary, we think it was not, and that it would have been competent for the court, even upon the same facts, to have admitted to bail, if he had been satisfied that the former conclusion attained upon the evidence was erroneous. But he was not compelled to re-try the facts, as

often as the prisoner chose to renew his application. It was, at most, a matter of sound discretion, and we think this record shows that he exercised it properly. The case of *ex parte* Lawrence (5 Binney's Rep. 304) holds, that the court is not even bound to grant a *habeas corpus*, where the case has already been heard upon the same evidence by another court. It is, however, added, that they do not wish to be understood as saying the court had not the power to issue the writ, if it had thought it expedient to do so. The case before us does not require us to go the length of that case; for here, the motions for bail were made in the same court, and the records of that court showed that the merits of the application sought to be renewed had been fully determined upon, and no reason was shown why it should be renewed. In applications for writs of *habeas corpus*, if the prisoner or petitioner make out a case which entitles him to his discharge, then the writ is matter of right; but if he shows, by the case which he makes in his application for the writ, that he is not entitled to relief, the writ will be denied; for it were useless to go through the ceremony of granting the writ, and having the party brought before the court, merely to be remanded back to the custody out of which he prays a discharge. See on this point, *ex parte* Croom and May, 19 Ala. 561. In this case, the record accompanying the applications shows that they should be denied.

Motions denied.

HARLAN *vs.* THOMPSON.

1. In debt on a prison bounds bond assigning breaches, it is a good plea that the prisoner, within sixty days from the date of said bond, surrendered himself to the jailor, without having committed any escape in the meantime.

ERROR to the Circuit Court of Choctaw.

Tried before the Hon. John Bragg.

HUNTINGTON, for plaintiff in error.

C. W. RAPIER, *contra.*

DARGAN, C. J.—This was an action of debt, brought by the plaintiff in error against the defendant, as the security of one Elisha Taylor, on a prison bounds bond. The defendant interposed several pleas, the third of which is, that the said Taylor, within sixty days from the date of said bond, surrendered himself to the jailor in discharge of said bond, without having committed any escape in the meantime. To this plea the plaintiff demurred, but his demurrer was overruled; and this is the sole question presented by the assignment of errors.

The substance of the plea only can be controverted, for it is entirely formal; and the decisions of this court clearly show that it forms a sufficient bar to the action. Tait, Use, &c. v. Parkman & Weaver, 15 Ala. 252; Morrow & Nelson v. Parkman & Weaver, 14 ib. 769; 8 ib. 288. It is unnecessary to say more than that the demurrer was properly overruled.

Let the judgment be affirmed.

McGEHEE *vs.* GINDRAT.

1. A debtor has an interest, and consequently a right, to know who is the true owner of a judgment against him, and in the absence of all evidence, save such as the record furnishes, he must look upon the person for whose use the judgment is recovered, as the true owner; and if he be a fictitious person, then the debtor may treat the nominal plaintiff as the real owner, and proceed to settle the demand with him.
2. Whatever is sufficient to put a party upon inquiry, is sufficient to charge him with notice; and a want of notice of a fact, resulting from a failure to use proper diligence to ascertain it, furnishes no protection to a party.
3. A debtor, against whom a judgment had been recovered in the name of his nominal creditor, for the use of a fictitious person, applied to the attorney of record, who was also the attorney of the real owner of the judgment, to know who was the true owner, that he might settle the judgment with him. The attorney, acting under the instructions of the real owner, refused to disclose his name, but informed the debtor that the nominal plaintiff had no right to settle the judgment, and that it had been transferred to one of his creditors. The debtor afterwards settled the judgment with the nominal plaintiff, and the sheriff returned the execution satisfied. On motion by the plaintiff, to have the execution satisfied, *it was held*,

That the defendant could not be charged with implied notice, from the vague

information communicated by the attorney, on the ground that it was sufficient to put him upon inquiry, since the inquiry, *as to the real owner*, had been made, and had proved futile.

ERROR to the Circuit Court of Lowndes.

Tried before the Hon. E. Pickens.

At the Spring Term, 1844, of the Circuit Court of Lowndes, John H. Gindrat, for the use of Levi W. Patton, recovered a judgment against Albert G. McGehee. While the suit was pending, one Haley Hutchinson, who held a note for $2,000 on said Gindrat, which was in the hands of R. A. Colclough, for collection, who was the attorney of record for Gindrat in said suit against McGehee, made an arrangement with said Colclough, that the judgment against McGehee, when collected, should be applied to the partial payment of the debt on Gindrat. In April, 1847, a judgment was obtained by Hutchinson on Gindrat's note, in the Circuit Court of Macon, and Colclough, who was Hutchinson's attorney in the case, before taking the judgment, deducted from the note the amount of Gindrat's judgment against McGehee, and only entered up judgment against Gindrat for the balance. Colclough afterwards informed Gindrat of his arrangement with Hutchinson, and Gindrat ratified and confirmed all that he had done.

It also appeared in evidence, that at no time did Levi W. Patton, or any other person, have any other interest in the judgment against McGehee, except Gindrat and Hutchinson, as above shown. On several occasions, McGehee applied to Colclough, to know who Levi W. Patton was, and who was the real owner of the judgment against himself, but Colclough, acting under the instructions of Hutchinson, refused to disclose his name, and only informed McGehee that Gindrat had no right to settle the judgment, as it had been transferred to one of his creditors. Afterwards, McGehee settled the judgment with Gindrat, and obtained from him an order on Colclough, as follows; "I have settled with Mr. McGehee the claim sued on in Lowndes county. Please arrange it so that Mr. McGehee can have the judgment satisfied by paying costs." (signed) "J. H. GINDRAT."

When Mr. McGehee presented this note to Colclough, the

latter then informed him that Hutchinson was the owner of the judgment, and proposed that they should go and see Gindrat about it, which McGehee declined. A few days afterwards, McGehee gave Gindrat's order to the sheriff, who had in his hands, at the time, an execution issued on the judgment against McGehee, and the sheriff thereupon returned the execution, with an endorsement, in these words: "Received costs and commissions: balance settled with plaintiff, as per his receipt or order. 17th Oct. 1848. B. HARRISON, sheriff."

At the Spring Term, 1851, of the Circuit Court of Lowndes, a motion was made by the plaintiff in the judgment to set aside this return, on the ground that the execution had not been satisfied. Issue being joined between the parties, the court charged the jury, upon the above state of facts, "that if Colclough told McGehee that the judgment against him belonged to one of Gindrat's creditors, and that Gindrat had no right to settle it, and after this, McGehee settled it with Gindrat, that then McGehee settled it in his own wrong, and the return on the execution must be set aside, and they should so render their verdict." To this charge the defendant excepted, and now assigns it for error. It is unnecessary to notice the other assignments of error.

ELMORE & YANCEY, for the plaintiff in error.

The charge given by the court below was based upon the assumption that McGehee had received legal notice of the transfer of the judgment to Hutchinson.

This was error, on the following grounds:

1. The proof shows that Patton, the usee in the judgment, never had any interest in the judgment, and that Gindrat was the sole owner. McGehee therefore had right to settle with Gindrat, at any time previous to the proper notification of the transfer.

2. That which is alleged to be notice, in this case, expressly concealed from McGehee to whom the transfer had been made, whom he was to recognise as the owner. Therefore it was no sufficient notice.

The owner of a judgment can control it; and this fact gives the defendant a right to know with whom he can settle.

The object of notice of a transfer is, to inform the party

not to settle with an improper person; and to do this, the party receiving notice has the right to be placed in as good a situation as he was before the notice.

Before the notice, McGehee could have effected a settlement with the owner—could have compromised, or obtained delay.

If the information given to him is held to be notice, then McGehee was deprived of this, and could only settle with the sheriff.

3. One object of a notice is, to put the party on his guard—on inquiry.

By the information given to McGehee, he was led to inquire,

1st, of Colclough, "Who is the owner?" Colclough refused to inform him;

2d, of Gindrat; and Gindrat claims the right to settle with him; and Colclough and Gindrat were the only persons privy to the transfer to Hutchinson.

4. In what capacity did Colclough give this information?

Not as the attorney of Gindrat, or as his agent; for Gindrat having transferred his judgment to Hutchinson, as between them, Colclough no longer represented Gindrat.

In giving notice, therefore, to McGehee, he acted as the agent of Hutchinson, who, however, was unknown to McGehee. Colclough's notification, therefore, was not the act of Gindrat, the real plaintiff in the case; and Gindrat being the only known owner, contradicted the idea of there being a transfer, and settled with McGehee. This authorized McGehee to disregard the notice. Whether, therefore, considered with reference to the notice itself, or with reference to the authority to be attached to the conflicting acts of Colclough, the agent of a concealed principal, and of Gindrat, the real plaintiff in the judgment, no sufficient notice was given to McGehee of a transfer of that judgment.

The proposition is true, that notice of a fact sufficient to put a party on inquiry, is notice of all the facts connected therewith, that he can learn by inquiry.

The proposition itself embraces another, that notice of the particular fact is not notice of other facts which cannot be ascertained by the inquiry.

An inquiry by McGehee as to the true owner of the judgment, caused by notice that Gindrat was not the owner, would have been useless and unavailing; because it was agreed between Hutchinson and Colclough, and we are warranted in saying Gindrat also, that McGehee should not receive this information.

But McGehee did inquire, and the information was withheld, and all the parties, by their silence and conduct, warranted McGehee in believing that Gindrat was the owner, especially when we remember that Patton had no interest in the judgment. At all events, the court should have left to the jury the question, if McGehee was warranted in this belief, and did in fact believe it.

N. HARRIS, *contra.*

1. A purchaser from a trustee is chargeable with notice, if he have notice of the trust, although he have no notice of the *cestui que trust.* 1 Hilliard on Real Notice, p. 331, § 13; 1 Murphy, 219; 2 Fonblanque's Equity, p. 444 note, and cases cited in note.

2. Notice of a claim is sufficient, if it is such as to put a party on inquiry. Godfrey v. Brandley, 2 McLean R. 412; 2 Vol. Supplement of U. S. Digest, p. 458, § 23; 7 Monroe, 599; 2 Pirtle's Digest, page 514, § 17; 1 Marshall R. 58.

3. The several charges prayed for by the plaintiff in error were abstract, there being no evidence in the records upon which they could have been predicated; and the contest here is not between two creditors or purchasers, but is between a defendant in a judg nent, who has paid the debt to a party who he knew had no right to receive it, and the person who really owned the judgment.

4. When a debt has been assigned, and the debtor has notice of assignment before payment, although he is not notified to whom it has been transferred, payment to the assignor does not release the debtor from paying it to the person to whom it had been assigned. Foster v. Mix, 20 Conn. R. 395.

CHILTON, J.—As it seems to be established that Patton, for whose use the suit against McGehee, in favor of Gindrat, was brought, had no interest in the recovery, McGehee had

the clear right to settle the judgment with Gindrat, unless before the settlement he had received notice, or such facts had been communicated to him as were equivalent to notice, of the transfer of the judgment to Hutchinson.

The main question, therefore, in this case is, whether the charge of the court, in respect to the sufficiency of the notice, is correct.

It was incumbent on Hutchinson, who sought to avoid the settlement between Gindrat and McGehee, on the ground of his right to the judgment, to prove, by sufficient evidence, that he notified the latter anterior to the settlement. His counsel insists that, although McGehee was not notified that Hutchinson was the owner, still he had such information as would reasonably put a prudent man on inquiry, and that this is equivalent to notice.

We think a debtor has an interest, and consequently a right to know who the true owner of the judgment is. It may be that he has cross demands, which either at law or in equity he is entitled to set off; or, if he has no such demand, he is interested in knowing to whom he may look for reparation, in the event of an abuse of the process of the court in proceeding to collect the judgment. In the absence of all information, save such as the record furnishes, he must look upon the person for whose use the judgment is recovered as being true owner. If he be a fictitious person, or as the counsel terms it, "a man of straw," then the debtor may treat the nominal plaintiff as the real owner, and proceed to settle the demand with him.

We have said this much to show that the information sought by McGehee of Colclough, as to who was the real owner of the claim, was such as should, in good faith, have been communicated to him, as a failure to do so might prejudice his rights, and lead to the adjustment of the demand with an improper person. But it is replied to this, that Colclough did inform him that Gindrat had no right to settle the judgment, aud that the same had been transferred to one of his creditors; this, it is argued, was sufficient to put him on inquiry, and consequently to charge him with notice. Fully conceding the rule to be that, whatever is sufficient to put a party upon inquiry is sufficient to charge him with notice, and that

a want of notice of a fact, resulting from a failure to use proper diligence to ascertain it, furnishes no protection to a party. 16 Ala. Rep. 597; 13 ib. 55; still this rule cannot be invoked by Hutchinson, as the facts are presented in this case. For here, inquiry was directly made of him, or rather of his agent and attorney, which amounts to the same thing, and the inquiry proved ineffectual. Indeed he had given instructions to the attorney not to inform McGehee that he was the owner of the judgment, and thus rendered all inquiry of him unavailing.

Now, we think it may be safely asserted, as a rule founded in justice and law, that where a party, whose interest may be affected by want of notice of a fact peculiarly within his own knowledge, refuses to communicate it upon direct inquiry made by the opposite party concerning it, he ought not to be allowed, after his adversary has acted in ignorance of the fact, to charge him with implied notice from vague information, which should put him on inquiry, since the inquiry, *as to him*, has been made, and has proved abortive. That he gave such vague information, instead of making a direct communication of the fact when inquired of, although not an estoppel, might well have misled the other party, and have justified him in assuming that Hutchinson was not the owner, else his agent would have so informed him. The question then resolves itself into one of fact for the jury, namely: Did McGehee settle with Gindrat, in ignorance of the fact that Hutchinson was the owner, and was that ignorance the result of a failure to make proper inquiry on the part of McGehee, or of a failure to respond to such inquiry on the part of Hutchinson. If McGehee was in fault in failing to inquire, he can take no advantage of his ignorance. If, on the other hand, Hutchinson purposely withheld from him a knowledge of his claim, when called on to disclose it, he then becomes the party in fault, and should not be allowed to take advantage of his own wrong, and charge McGehee with implied notice of a fact which he purposely refused to disclose. That McGehee might have settled with the sheriff or attorney does not, we think, affect this principle.

These views sufficiently show that the charge of the court, when construed with reference to the facts, was wrong.

Let the judgment be reversed, and the cause remanded.

POACHER *vs.* WEISINGER, ET AL.

1. To support a writ of *fi. fa.* issued under the statute (Clay's Digest 305 § 45) against the securities of an executor, it is indispensable that a *fi. fa.* should have been issued against the executor, and returned "no property found;" otherwise the execution against the securities is void, and may be quashed on motion.

ERROR to the Court of Probate of Perry.

The estate of Sterling Gorman, deceased, was declared insolvent in April, 1843, and the Judge of the Orphans' Court being incompetent from interest to preside on the settlement, commissioners were appointed under the statute, by the Judge of the Circuit Court, to settle the estate. The commissioners rendered a decree in June, 1845, which was entered of record on that day. This decree is entitled, "Commissioners' Court, Special Term, sitting for the settlement of the estate of Sterling Gorman," and it recites that the executor, Leonard A. Weisinger, and several creditors of the estate appeared on that day before the commissioners; that the executor presented his accounts and vouchers for settlement, from which it appeared that he was chargeable with $20,129, assets received by him, in addition to the amount with which he had previously been charged, and was entitled to credits, for moneys paid out by him, to the amount of $9,750 $\frac{74}{100}$, leaving a balance in his hands due the estate of $10,372 $\frac{26}{100}$. A dividend of sixty per cent., in addition to the amount previously declared, is then decreed in favor of the several creditors, of whom the plaintiff in error was one, for which executions are ordered to issue, "returnable to a meeting of the undersigned commissioners, on the sixth Monday after the fourth Monday in September next." A minute entry recites that this decree "was entered of record." The former decree referred to is not set out in the record. An execution was issued on the decree in favor of the plaintiff in error against the executor on the 10th September, 1845, which recites the rendition of the decree "at a Special Commissioners' Court," and is made returnable "before the commissioners of our said court, on the sixth Monday after

the fourth Monday in September, 1845." This execution was levied on land and some personal property, and was "returned without sale, plaintiff's attorney having postponed the sale of the land, and the other property not sold for want of bidders." Another execution in the same form, issued against the executor on the 27th May, 1846, and was returned "no property found."

On the 1st March, 1849, a notice was issued to the plaintiff in error that a motion would be made, at the next term of the Orphans' Court, to quash an execution which had issued on the 19th February, 1849, against Weisinger, as executor of Gorman, and Lockhart and Johnson, as his securities on his bond as executor, returnable to the next term of the County Court; but the execution itself nowhere appears in the record. At the next term of the Orphans' Court, *held on the 19th March*, 1849, it is recited in the judgment entry that the plaintiffs in the motion appeared by their attorney, "and the said plaintiff in execution *came not, but made default;* and it appearing to the satisfaction of the court that said plaintiff has had legal notice of said motion, and that all the executions issued on said decree against the said executor were utterly void, and that all the several grounds stated in said motion are true, it is ordered," &c., "that said execution be quashed."

The next entry recites that "*afterwards, on the* 19*th March*, 1849, *the plaintiff filed his bill of exceptions*," which is then set out. From this bill of exceptions it appears, that on the hearing of the motion the plaintiff in execution appeared and resisted it, and in addition to the two executions above described, produced another execution, which issued against the executor in favor of the plaintiff in error, *on the* 14*th January*, 1847, and was returnable to the next regular term of the County Court, to be held on the first Monday in February, 1847, and which was returned "no property found." It then recites that "upon this state of facts, the court decided that the executions issued on the 10th September, 1845, and 27th May, 1846, were null and void, and therefore the execution issued *on the* 14*th January*, 1847, having no previous execution to support it, and more than a year and a day having elapsed from the rendition of the decree on which it

issued, *was irregular and should be quashed*, and gave judgment accordingly; to which defendant excepted."

JOHN, for plaintiff in error.

MOORE & GARROTT, *contra.*

LIGON, J.—The record in this case no where shows that Johnson and Lockhart, against whom the execution quashed in the court below issued, were ever parties to any proceeding or judgment in that court. They are said to be the sureties of Weisinger, on his bond as executor; but the record contains no such bond, and without it, and a *fi. fa.* against the executor returned "no property found," there is no predicate for the writ of *fi. fa.* mentioned in the bill of exceptions; and it was rightly quashed on motion.

Nor does the record show such a judgment against Weisinger, and regular issue of writs of *fi. fa.* upon it, as would authorize the issue of the execution quashed in the court below. We will not reverse, unless the record shows a judgment in the court below, on which an execution could rightfully issue.

Let the judgment be affirmed.

WILKINSON *vs.* MURPHY.

1. The action of the Court of Probate on a writ of *habeas corpus*, cannot be reviewed in the Appellate Court on a writ of error.

ERROR to the Court of Probate of Randolph.

Barnaby Wilkinson, as guardian of Matilda Wilkinson, sued out a writ of *habeas corpus* in the name of his ward, returnable before the Judge of Probate, to obtain her custody and control from the defendant in error, who detained her. On the hearing of the writ, the judge refused to make any order for the delivery of the infant to her guardian, and allowed the defendant to retain her. Thereupon, the guardian

sued out a writ of error to the Supreme Court, and a motion is now made to dismiss the writ.

FALKNER, for the motion.

A writ of error does not lie in this case.—Bacon, 554–5; 3 Watts & Serg. 416; 2 Howard, 65; 13 Johns. 418. It is a question of discretion with the court as to the custody of an infant, and the Appellate Court will not revise the action of an inferior court in a matter of discretion.—18 Wend. 79.

HEFLIN, *contra*,

Contended, that the right of the guardian to the custody of his ward was not a matter which the court might grant or refuse, in its discretion, but a legal right which the courts were bound to enforce; and the refusal to act was revisable on writ of error.

Per curiam.—A writ of error does not lie to the judgment of the Court of Probate on the hearing of a *habeas corpus.* The judgment cannot be said to be final, as it is not conclusive on the rights of the party, who may renew his application to the same, or another tribunal.—*Ex parte* Campbell, at the present term; or he may obtain the aid of this Court, by proceeding according to the practice settled in *ex parte* Croom & May, 19 Ala. Rep. 561.

The writ of error must be dismissed.

ROSS (CREDITOR), *vs.* ROSS (ADMINISTRATOR).

1. A claim against an estate regularly declared insolvent, which has been filed in due time with the clerk, having been taken from the office for a special purpose with the permission of the Judge of Probate, and not having been returned through inadvertence, does not lose its place as a claim filed in time, because it cannot be found in the office on the last day allowed by law for filing written objections to claims which had been filed against the estate.
2. In contests under the statute (Clay's Dig. 194), between the creditors of an insolvent estate, it is a proper practice for the creditor, against whose claim an objection in writing has been filed, to declare upon it, as in a suit at common law, against the administrator *de bonis non* (defending in behalf of the ob-

jecting creditor), as defendant; and the declaration is not demurrable because the creditor, as plaintiff, *declares against himself*, as administrator *de bonis non*, as defendant.

3. An admission that the debt is *then due*, or that a liability *then exists*, will remove the bar of the statute of limitations, and revive the cause of action. Such an admission includes, not only an acknowledgment of the correctness or justice of the demand, but also a willingness to pay it.
4. The implied promise to pay, arising from such an admission, is as effectual to remove the bar of the statute of limitations and revive the debt, as an express promise.
5. A charge which asserts, "that it requires an express promise, or something equivalent to an express promise, to revive the original cause of action after the statute has effected a bar," is erroneous; because it admits of two constructions, one of which asserts an incorrect legal proposition.
6. It is not the duty of the court to modify or give precision to a charge requested by counsel; but a charge may be properly refused, if it admits of two constructions, one of which asserts an incorrect legal proposition.

ERROR to the Probate Court of Randolph.

It appears from the record, that the estate of Andrew Burnham, deceased, had been duly declared insolvent by the Orphans' Court of Randolph, in December, 1849, and that Frederick Ross was afterwards appointed administrator *de bonis non*.

On the 9th day of September, 1851, which was the last day allowed by law for filing objections in writing to the allowance of any claim against the estate, James S. Pearson, a creditor of the estate, presented himself at the office of the Probate Judge, and demanded an inspection of the claims on file against the estate, that had been filed pursuant to law, within six months from the time when the estate was declared insolvent, in order to present written objections to certain claims filed, or supposed to be filed, by Frederick Ross. Upon examination, no such claims were to be found on file, and Pearson then objected in writing to the reception of any such claims subsequently, as claims filed in time. The facts were these: Ross had filed his claims against the estate of Burnham, of which he was *administrator de bonis non*, in due time, but by permission of the Judge of Probate, he withdrew them for a certain purpose, and by mistake took away the claims themselves and the affidavits by which they were described and verified, which were intended to be left in the office; and by inadvertence, none of the papers were return-

ed to the office until after the objection was taken, as aforesaid, to their being considered as filed. At the same time that the objection aforesaid was made, Pearson also filed his objection in writing, to the allowance of these claims of Ross, reserving as far as he could his previous objection.

The court decided that the claims should be considered as claims properly filed, and required the creditor to proceed to contest them upon the merits, to which he excepted.

The cause then proceeded, as upon a declaration regularly filed by the claimant Ross, upon his demands against himself as *administrator de bonis*, (defending in behalf of Pearson, the contesting creditor). To this there was a demurrer, which was overruled.

The parties then went to trial, as on issue joined. In the course of the trial, a witness for Ross the claimant, after relating some previous conversation between Ross and Burnham, testified as follows: Ross said, "Doctor, there are some notes and accounts between you and me, from the year 1840, that are probably out of date, and I am willing to acknowledge them all in date, if you are." Dr. Burnham replied: "Yes, I always expected to do so." This was a few days before the death of Burnham. The same witness testified, that in May, 1848, and previous to the conversation last mentioned, Burnham admitted to him that he was indebted to Ross, and that he had borrowed some $200 as many as four times from him. The claim declared upon was a note from Burnham to Ross for $200 for cash loaned, bearing date 7th January, 1841, payable ten days after date, with interest from date.

The court charged the jury who tried the issue:

1. That any expression which amounted to an admission that the debt was due, or that the liability existed at the time, took the case out of the statute of limitations, and revived the original cause of action.

2. That such an acknowledgment is an implied promise to pay, and is equivalent to an express promise to pay, and it has the same effect whether it is made to the creditor or to another person, or whether it is made before or after the time at which the statute would create a bar to the action.

The counsel for the contesting creditor requested the court

to charge the jury: That an acknowledgment of the justness of a debt would only postpone the bar of the statute six years longer, but that it took an express promise, or something equivalent to an express promise, to revive the original cause of action after the statute had effected a bar. This the court refused.

Overruling the objection of plaintiff in error, to receiving the claim as one properly filed;

Overruling his demurrer to the statements or declaration;

And the charges given and the refusal to charge as aforesaid, are severally assigned as error.

FALKNER, for plaintiff in error.

1. The demurrer to the declaration should have been sustained, because a party cannot sue himself in any case.

2. The charges of the court, as to the statute of limitations, are erroneous.—Dey's Ex'rs v. Jones' Ex'rs, 19 Wend. 491; Lowther *et. al.* v. Chappel, 8 Ala. Rep. 353, and authorities cited; Lyon *et al.* v. Bank, 12 ib. 508.

HEFLIN, *contra:*

1. The rights of the creditor were not prejudiced, by the temporary withdrawal of his claim from the office with the permission of the judge.—Rutherford's Adm'r v. Branch Bank at Mobile, 14 Ala. Rep. 92. Nor was the contesting creditor injured by the withdrawal, for he filed his written objection to it, and had an issue submitted to a jury to try the validity of the claim.

2. In actions on contracts, any expression which amounts to an admission that the debt is then due, or that a liability then exists, will take the case out of the statute of limitations, and revive the cause of action.—4 Porter, 223; 10 Ala. Rep. 959; 4 Johns. R. 468; 6 ib. 268; 11 ib. 147; 15 ib. 519; 2 Starkie on Ev. 661 (top page); 4 Phil. Ev. 138; 2 Green on Ev. § 436.

PHELAN, J.—The objection to the claim of Ross, because it was not on file at the time Pearson called to examine it, was properly overruled. The claim had been regularly filed, supported by affidavit, but the Probate Judge had given permission to Ross to withdraw the claim. By mistake both note

and affidavit were taken from the office. The claim having been once regularly filed in time, secured to it all the advantage that the law gives to that act It was the duty of the judge, to have kept a list or docket of claims for the inspection of the creditors, but if he does not do so, and permits a claim to be withdrawn temporarily for a particular purpose, the claim will not lose its place as one on file. It is moreover plain, that no injury was done, for Pearson filed his objection to the allowance of this claim, although it was not on file.

The demurrer to the declaration was also properly overruled. It is based upon the idea that a man cannot sue himself. That may be true upon general principles, but the answer to the objection is, that in this case the statute authorizes and directs that this very thing shall be done, and there was indeed no better course to be devised to regulate the contests in the Probate Court between conflicting creditors. The imposition of costs is placed fully under the discretion of the Probate Judge. The statute relating to this subject is in these words: "The court shall cause an issue to be made up between such claimant as plaintiff, and the administrator, or the contesting creditor *in the name of the administrator*, as defendant, by pleading thereon in the same manner as if the claimant had sued the administrator at common law."—Clay's Dig. 194, § 11.

This brings us to the consideration of the charges of the court.

The court below charged the jury: That any expression which amounted to an admission that the debt was due, or that the liability existed at the time, took the case out of the statute of limitations, and revived the original cause of action.

And further: That such an acknowledgment is an implied promise to pay, and is equivalent to an express promise to pay; and it has the same effect, whether it is made to the creditor or to another person, or whether it is made before or after the time at which the statute would create a bar to the action.

In this case it will be observed, that the bar of the statue was complete at the time of the conversation with Burnham, so that a part of the last charge is abstract.

We have held in a case decided at the present term, Townes & Nooe, Ex'rs v. Ferguson, that when the bar of the statute of limitations is complete, it is necessary to remove that bar that there should be, not only a subsequent acknowledgment of the *correctness* of the plaintiff's demand, but also a manifestation of *willingness* to pay it. In this we have but followed the current of the later decisions on this much disputed question.—Angell on Lim. 247 to 250, and authorities cited; Greenl. Ev. § 40; Lowther *et al.* v. Chappell, 8 Ala. Rep. 353, and authorities cited.

We did not, by that decision, mean to be understood as saying that nothing but an *express promise to pay* would suffice; because, if that had been our intention, it would have required but a few plain words to put that intention beyond the reach of doubt or controversy. We meant no more than to adopt and follow the doctrine which is declared by Mr. Greenleaf on a review of all the cases, to be the "general doctrine now well established," and which he lays down in these words; "That the acknowledgment must not only go to the *original justice* of the claim, but it must admit that it is *still due.*"

It is not perceived that the instructions given to the jury conflict with this doctrine. If the admission was that the *debt was due* at the *time of the admission*, or, what is the same thing in other words, that it was a *liability* which *existed* at *that time*, it brought the case within the rule laid down by Greenleaf, and adopted by this court in the case of Townes & Nooe v. Ferguson; and the first charge was correct.

The correctness of the second charge, the main and most important feature of which is, that such an acknowledgment—that is, of a *subsisting debt or liability*—is an *implied promise* to pay, and as such, is just as effectual as an *express promise* to take the case out of the statute, follows as a necessary consequence of the first.

The charge refused is in these words: "That an acknowledgment of the justness of the debt would only postpone the bar of the statute of limitations six years longer, but that it took an *express promise*, or something *equivalent to an express promise*, to revive the original cause of action after the statute had effected a bar."

To a mind unaccustomed to the precision so very necessary generally to correct decisions in questions of law, there may not appear, at the first glance, any good reason why, if the charges given are correct, it would not be proper to give the charge that was asked. In one light, and upon one construction, that charge is correct, and upon another it is incorrect; and as it admits of two constructions, one of which was calculated to confuse and mislead the jury, and as no explanation or qualification was given by the party asking it, the court properly refused it. When this charge affirms, "That it took an express promise, or something equivalent to an express promise, to revive, &c.," if it is to be construed as signifying that it took an express promise, or something *equivalent* to an express promise *in law* to revive, &c., it was correct. That was what the court had just declared. But if it is to be construed as signifying, that it took an express promise, or something *equivalent* to an express promise *in terms*, it is incorrect. The two, though generally equivalent *in law*, as the foundation of an action, are in no other respects equal or equivalent; not in the terms which create them, at any rate, for here they are strictly opposites, as the words "*express*" and "*implied*," of themselves import: these are antagonistic terms. To say, then, in a charge to a jury in this case, that it took an express promise, or something *equivalent* to an express promise, without more, without noticing in any manner this distinction, was calculated to mislead, and as it was not the duty of the court to modify or give precision to the charge, as asked, it was properly refused.—See Morrison v. Wright, 7 Por. 67; Carmichael v. Brooks, 9 Por. 330.

We find no error in the record, and the judgment below is affirmed.

PARSONS *vs.* BOYD.

1. To maintain detinue, the plaintiff must show that he has the exclusive legal title to the chattel sued for.
2. The statute of this State which abolishes the right of survivorship between joint tenants, (Clay's Digest, 169,) applies only to those who hold the absolute property in their own right, and not to those who hold as trustees merely, or in *autre droit.*
3. If a power coupled with a trust be given to two or more, it may be executed by the survivor of them.
4. When personal property is conveyed by deed of trust to two trustees, with power to sell and pay the debts intended to be secured, the survivor of the trustees has the entire legal title to the property, and may maintain detinue for its recovery.
5. It is not essential to the probate of a deed that it should be proved to have been executed on the day of its date. It is *prima facie* sufficient, if the date of the deed and the date of the certificate of probate show that the instrument was recorded within the time required by law.
6. A recital in the certificate of probate that the grantor acknowledged the deed "to be his free act and deed," is tantamount to saying that he "signed, sealed and delivered" it.
7. When the endorsements on a deed show at what time it was left with the clerk for registration, and the book and page in which it is recorded, and these endorsements appear to have been made by the clerk, there is *a substantial compliance* with the statute, (Clay's Digest, 155, § 23,) and the endorsements may be read in evidence.
8. The admission of improper evidence against a party furnishes no ground of reversal, when no injury can by possibility result from its admission.
9. A deposition will not be suppressed because the christian name of the witness is not stated in the affidavit made to procure the issuance of the commission, when the commission and notice so describe and identify the witness as to preclude the idea that the opposite party could have been misled or injured by the omission.
10. When a deposition appears on its face to have been regularly taken, and there is nothing in the commission or notice to show that it was illegally or irregularly taken, a motion to suppress it, on the ground that the notice of the time and place of executing the commission was insufficient, is addressed to the sound discretion of the primary court, and its action cannot be reviewed on writ of error.
11. An attorney will be presumed to have read a declaration to which pleas are filed in the name of a firm of which he is a partner; and the record of the suit in which such proceedings were had, is admissible evidence in a subsequent suit against the attorney, to prove actual notice to him of the plaintiff's title, as set out in said declaration.

ERROR to the Circuit Court of Talladega.
Tried before the Hon. E. Pickens.

ALEX. WHITE, for plaintiff in error:

1. The deposition of "Mrs. Reese" should have been suppressed, because her christian name is not set forth in the affidavit, nor in the fiat of the judge authorizing it to be taken. The *clerk* inserted it in the commission upon his own authority. The design of the statute, in requiring the affidavit to disclose the name of the witness, is too obvious to require comment, and with equal propriety it might omit to state, "the testimony may be material" to the party. Clay's Dig. 165, § 1.

The fact that there was but *one* "Mrs. Reese" in the county, known to the witnesses who were offered to aid this defect, and the further fact that "Mrs. Reese" was well known to plaintiff and his counsel, can have no influence in settling a general rule of law, for "*the right to take testimony by deposition must be exercised in strict conformity with the statute.*" Parker v. Haggerty, 1 Ala. Rep. 633.

Again: the judge's order directs that notice of the time and place of executing the commission shall be given "by 11 o'clock, A. M. of that day," and that a commission shall issue to take her deposition "*between* the hours of 7 and 9 o'clock, A. M., on Monday next." *Neither of these commands have been complied with.* The return of the sheriff shows the notice was executed on that day in general terms, and the statute provides that "*such notice* of the time and place shall be given, as the *judge* shall think proper," Clay's Dig. 164, § 2. The commission, instead of conforming to the judge's order, which was the clerk's only power to act, to take the deposition "between the hours of 7 and 9 o'clock, A. M., of Monday next," is general in its terms, and authorizes the commissioner therein named to call the witness *at any time.* For these irregularities the deposition should have been suppressed, notice of the motion having been duly given, and the party not having had an opportunity to cross-examine the witness.

2. The deed from Bell to Boyd and Taliaferro should not have been received in evidence *as a recorded deed.* The certificate of the clerk is, that Bell acknowledged it to be "his free act and deed." This does not conform to the statute either in *form* or *substance*, see Fipps v. McGehee, 5 Por. 434; and Shelton v. Armor, 13 Ala. 652. This last is directly in

point, for the deed was offered *as a recorded deed.* In McCaskle v. Amarine, 12 Ala. 22, the court says, "the registration cannot be regarded as an official act, so as to operate a constructive notice." The certificate of acknowledgement must be, "*given under my hand and seal.*" Clay's Dig. 153, § 7.

It is by the *first* section of the act of 1818, Digest, 153, § 10, that *clerks* are authorized to take and certify acknowledgments of deeds of conveyance, "*in like manner and form* as is *now* required by law before judges."

Again: there is no certificate whatever in conformity with the statutes above referred to, showing that the deed was ever recorded or left for record. The *memoranda*, "recorded," "Jas. E. Belser, C. C. M. C." is not sufficient, and this court has in effect decided as much, Dubose v. Young, 10 Ala. Rep. 368. In that case the point was, whether the clerk could *certify* the fact that the deed had been recorded, or left for record, but the court will observe, that the certificate was in the proper form. *The improper admission* of merely cumulative evidence is sufficient to reverse a judgment, see Jones v. Falkner, 12 Ala. Rep. 165. Upon the question of an official seal, see Phillip's Ev. C. & H. Notes, Part 2, Vol. 3, 1130.

3. The writ, declaration, &c. in the case of Boyd v. Bell, was wholly incompetent as evidence against the plaintiff in error. The fact that he was one of the legal firm, whose name appeared as counsel for Bell in that suit, does not charge him with notice of Boyd's title. That would be carrying the doctrine of *constructive* notice quite too far. In fact, nothing will supply the place of *actual notice*, unless it is so declared by statute.

The proceedings and record of a cause are only evidence between *parties and privies.* The plaintiff in error claims under Pharr and Beck, and adversely to Boyd, see Davis v. Wood, 1 Wheaton, 6

4. The deed from Bell to Boyd and Taliaferro, under which Boyd makes title, should have been excluded, because by the deed which conveys land and negroes, Boyd and Taliaferro became *joint* tenants. The title which vested in them under it, possessed all the requisites of joint tenancy, viz: "unity of interest, title, time and possession," see 2 Vol. Black Com. marginal, 180.

By our statute, when two or more persons hold an estate, *real* or *personal*, *jointly*, and one joint tenant dies before severance, his interest shall not survive to the remaining joint tenants, but shall descend to and be vested in his heirs or legal representatives, in the same manner as if his interest had been severed and ascertained, Clay's Dig. 169, § 6. Therefore, it is insisted in this case that by the death of Taliaferro, his legal representative became a necessary party to this suit as plaintiff with Boyd; because, in actions of *detinue*, "it is well settled in this State, that to recover, the plaintiffs must have the *entire* interest in the thing sued for." Price v. Tally, adm'r, 18 Ala. 25; Miller v. Eastman, 11 Ala. Rep. 609–14; Hogan v. Bell, 1 Stew. 536; and in Knight v. Leck, 2 Dev. & Batt. 133, the personal representative was actually made a party plaintiff, and the judgment which he, in connection with the other joint owner, obtained, *was affirmed.* See also Mason v. Maury, 8 Por. 233; Boyatt v. Kerr, 7 Ala. Rep. 15, 16; see also Sugden on Powers.

But it is said, here is a power coupled with a trust, and that under such circumstances the *power survives*, therefore the estate must also. Let it be conceded the power survives, and it by no means follows that the estate does.

First, because they are separate and distinct, arising at different times and by different means. The *estate* is joint, and created by the deed, and it vested immediately on its execution. The *power* is joint also, but did not arise until the law day of the deed. The statute operates on the estate conveyed by the deed, but does not interfere with the power. And as both must have joined in this action while living, our statute is designed to secure the same unity in a suit brought after the death of one. Suppose both were dead; in that event, would it be contended that Boyd's legal representative could recover, and he only. The rule we contend for is far more just and reasonable.

5. If this position is not tenable, we then insist Boyd should have set forth, *not his title*, but the character in which he sues; *he should have sued as survivor.* Suppose one who is executor or administrator should bring an action of detinue for a slave, belonging to the estate which he represented, in his own name, without setting forth the character or right in which

he sued, could he recover? Most unquestionably he could not. The outstanding title in the estate would defeat him, and the only fact which would show that its rights are vested in him, could not be proven by him, *because he has not sued in that character*. Thus, in the case at bar, this deed vested the estate *jointly* in Boyd and Taliaferro; if, notwithstanding our statute, by the death of the latter the whole estate survived to Boyd, then, in order to show the fact, he must sue in the character of *survivor*.

WOODWARD & BELSER, *contra:*

1. The deposition of Mrs. Reese should not have been suppressed. Clay's Dig. 167, §§ 12, 17.

2. The deed of Bell to Boyd and Taliaferro, with the certificate of the clerk, and his other memoranda, were properly read in evidence, and it was *constructive* notice. Herbert v. Hanrick, 16 Ala. Rep. 597; Dubose v. Young, 10 ib. 369; Hobson v. Kissam, 8 ib. 357; Clay's Digest, 155, § 23; 18 Ala. Rep. 668.

3. But if Pharr and Beck and Parsons did not have constructive, they had *oral* notice, and that was sufficient. 12 Ala. Rep. 646; Allen v. Railroad Co. 11 ib. 438.

4. Boyd could maintain the action at law. The power conferred on him was one coupled with an interest, and it survives. 12 Ala. Rep. 673; Peters v. Beverly, 10 Peters, 533; Taylor v. Benham, 5 Howard, 233; Williams v. Otey, 8 Hump. 563; Franklin v. Osgood, 14 Johnson, 553; Burnett v. Pratt, 22 Pick. 556.

5. Where the power is a *naked* one, the court will observe *the utmost strictness* as to its execution, but where *it is connected with an interest*, they will construe *liberally*, that the interest may be protected. Taylor v. Benham, 5 Howard, 233; Peters v. Beverly, 10 Peters, 533.

6. Our statute as to non-survivorship applies to absolute estates only, and not to such an estate as Boyd claims in this case. Besides, Taliaferro's heirs have no interest in the matter. He did not pay any part of the debt. Clay's Dig. 169, § 6; Appleton v. Boyd, 7 Mass. 134.

7. Boyd in the pleading need not describe himself as survivor. Vanderheuvel v. Storrs, 3 Conn. 207.

8. If the deed from Bell to Boyd and Taliaferro is notice, then the question of notice is at an end, because all the parties are bound by it. The attempt to fix *oral* notice on Parsons below is not cumulative. *The deed is good as constructive notice, or it is not*, and the *oral* notice was proper independent of it. Allen v. Railroad Co. 11 Ala. Rep. 438.

9. There is no question raised on the record as to Watson's not having notice. The only motion was to exclude evidence *oral*, going to show notice to Parsons. The evidence was permissible. *If any question had been raised as to want of notice to Watson only, the plaintiff then might have been bound to prove it, but not otherwise.*

DARGAN, C. J.—This is an action of detinue, which was commenced by the plaintiff to recover of the defendant a slave by the name of Dick. The plaintiff, to show title to the slave, read in evidence a deed executed by B. W. Bell, by which several slaves, one of which was the slave in controversy, and a tract of land, were conveyed to the plaintiff and one Thornton Taliaferro jointly, for the purpose of securing the said plaintiff and Taliaferro against their liability as endorsers of a bill of exchange, which had been drawn by Bell, and endorsed by the grantees in the deed, Boyd and Taliaferro. This deed gave to the grantees the power to sell the property conveyed thereby, for the purpose of paying said bill of exchange, and indemnifying themselves. It further appeared that Taliaferro had died before the commencement of this suit. Upon these facts the question was made by the defendant, whether the plaintiff could bring detinue in his individual right and recover.

The law is settled, that in the action of detinue the plaintiff must show an exclusive legal title to the chattel sued for; and should it appear that he was but a tenant in common, or a joint tenant with another, and that the legal title was in both, then both must join in detinue, for one alone cannot, under such circumstances, sustain the suit. Hogan v. Bell and wife, 1 Stew. 536; Miller v. Eastman, 11 Ala. Rep. 609; Price v. Talley's adm'r, 18 Ala. Rep. 21. But we are entirely satisfied that the deed from Bell to the plaintiff and Taliaferro, connected with proof of Taliaferro's death before the

suit was brought, shows that the plaintiff has in himself the entire and exclusive legal title to the slave in controversy. Our statute, it is true, has done away with all joint tenancies, as known at the common law, and declares that when two or more persons shall hold an estate, real or personal, jointly, and one joint tenant dies before severance, his interest in the joint estate shall not survive to the remaining joint tenant or joint tenants, but shall descend to, and be vested in, his heirs or other legal representatives, in the same manner as if his interest had been severed and ascertained; Clay's Dig. 169. This act, however, only applies to such joint tenants as hold the absolute property in their own right, and not to those who hold as trustees merely, or in *autre droit.* The evil that our statute intended to remedy was, to cut off the *jus accrescendi*, or right of survivorship, which existed at the common law, and to give to the heirs at law of joint tenants the interest of their ancestors, in the same manner as if they had held as tenants in common, and not as joint tenants. It was thought unreasonable that the death of one joint tenant should give the entire estate to the survivor *for his own use,* to the exclusion of the heirs or next of kin of the deceased tenant. But when the tenants hold as trustees for particular purposes, or in *autre droit*, and can gain no advantage to themselves by the right of survivorship, then they are not within the reason of the statute, nor does the evil exist which it intended to remedy, for no profit or benefit will result to the survivor, and although he take, by the death of his co-tenant, the entire legal title, yet he will hold it as trustee, or in the right of another, and for his use and benefit. Joint trustees are not within the reason of the statute, nor the evil intended to be remedied by it, and to hold that their joint title is affected by the act, could be productive of no good; it could avoid no evil, but, on the contrary, might often lead to protracted litigation, and serious injury to the trust estate. It is a well settled principle of law, that if a power, coupled with a trust, be given to two or more, it may be executed by one who has survived the others. Hawkins v. May, 12 Ala. Rep. 673; Taylor v. Benham, 5 How, 233; Peters v. Beverly, 10 Peters, 532; Franklin v. Osgood, 14 John. 527. Boyd, therefore, had the right to execute the trust by selling the property

conveyed by the deed, and if the right to execute the trust was exclusively in Boyd, if this power survived to him notwithstanding the statute, it is clear that he must be held possessed of such title as will enable him to execute the trust; and this must be the exclusive legal title, for he alone had the power, upon the death of Taliaferro, to sell the property. We are, therefore, of the opinion that the evidence showed that the plaintiff had the entire legal title.

2. It is again insisted that the acknowledgment of the deed of trust, as appears from the clerk's certificate, was not sufficient to authorize its registration under our statutes, and consequently that the deed is void as against the defendant, who claims to be a purchaser, deriving his title from Bell, the grantor in the deed. The deed bears date on the 28th day of March, 1838, and the certificate of acknowledgment is as follows: "The State of Alabama, Montgomery County: I, James E. Belser, Clerk of the County Court of said County, do hereby certify, that on the 28th day of March, A. D. 1838, the above named Bushrod W. Bell personally appeared before me, and acknowledged the above and foregoing instrument to be his free act and deed, for the purposes therein expressed and contained. Given under my hand the day and year above written. James E. Belser, Clerk C. C. M. C."

The first objection to this certificate is, that it does not expressly allege that the grantor executed the deed on the day of its date. But this objection cannot prevail; the very same point was made in the case of Bradford v. Dawson, 2 Ala., 203; and it was there decided that the certificate of acknowledgment was sufficient. The same question again came up in the case of Hobson v. Kissam, 8 Ala., 357; and again in the case of Herbert v. Hanrick, 16 Ala., 597; and in both of these cases, it was held not to be essential to the probate of a deed, that the proof or acknowledgment contained in the certificate should show that the deed was executed on the day it purports to bear date. The statute, it is true, gives a form, and in this form thus given, it is required that the proof should show that the deed was executed on the day of its date, Clay's Dig., 153; but the same statute provides that the certificate or acknowledgment of a deed shall be good, if it contains the substance of the form thus given, whether it be in

the form or not. We could not, therefore hold this certificate defective, without holding that it was matter of substance that the certificate should show that the deed was actually signed and delivered on the day of its date. But the mere date of a deed is not matter of substance, for it may be shown to have been executed on a different day from the day of its date; it takes effect from its delivery, and not from its mere date. Under this statute and the decisions to which we have referred, we think it clear that the proof required, before a deed should be admitted to record, need not show that the instrument was executed on the day it purports to bear date. It is *prima facie* sufficient at least, if the date of the deed and the date of the certificate of probate show that the instrument was recorded within the time required by law.

The next objection to the certificate is, that it does not use the words "signed, sealed and delivered," but simply that the grantor "acknowledged it to be his free act and deed." This objection is also unavailing; the acknowledgment that the instrument was the free *act and deed* of the grantor, is tantamount to saying that he signed, sealed and delivered it.

It is further insisted that the court erred, in permitting the endorsements on the back of the deed made by the clerk, showing when the deed was left with him for record, and the book in which it was recorded, to be read as evidence. These endorsements are as follows: "Rec'd for registration, March 28th, 1838. Jas. E. Belser, C. C., M. C. Recorded in book O., pages 708, 709, April 23rd, 1838, James E. Belser, C. C , M. C." The act requires that the clerk shall give a receipt to any one who shall leave with him a deed to be recorded, and further requires that he shall certify on or under such deed or conveyance the day of the month and year when he received it, and the name or number of the book and the page or pages in which it is recorded. Clay's Dig. 155, § 23. The form of the certificate required by this section of the act is not prescribed by the statute, and we are unwilling to lay down any particular form as indispensably requisite. All that this section of the act requires, in my judgment, is this, that the endorsements on, or under the deed, should show when the deed was left for registration, and the book and page in which it is recorded, and these endorsements should

appear to be made by the clerk. When this is done, there is a substantial compliance with this section of the act, and nothing more is necessary to entitle these endorsements to be read as evidence, showing when the deed was left for registration, and the book in which it is recorded.

These reasons bring us to the conclusion that the deed was duly registered, according to the provisions of our several acts, and consequently operated as constructive notice to all subsequent purchasers who derive title from or under Bell, the grantor. Attaining this conclusion, proof of actual notice of the deed to the defendant, and those under whom he claims, was an immaterial inquiry; for whether they had such actual notice or not, could in no wise affect the plaintiff's right to recover. They were charged with notice by operation of law, and it was unnecessary to prove notice otherwise. If, therefore, it were admitted that the evidence relied on to prove notice actually given was inadmissible for this purpose, still it could not be such an error as would work a reversal of the judgment; for we have heretofore held, and upon reasoning entirely satisfactory, that when no injury can by possibility result to a party from the admission of improper evidence against him, it furnishes no ground of reversal. Herbert v. Hanrick, 16 Ala. Supra. It is true, that we must be able clearly to see that no injury could have resulted from the admission of such evidence, and if we cannot clearly and beyond doubt see this, then we must reverse, for we would not know whether injury had resulted from the errror or not.

In the case before us, it is difficult to perceive how the plaintiff's right to recover could be affected, whether Pharr & Beck, through whom the defendant claims, had actual notice or not, of the deed of trust through which the plaintiff derives his title, before they acquired their mortgage from Bell; and we should, therefore, be inclined to affirm the judgment, even if the deposition of Mrs. Reese, who was examined to prove actual notice, ought to have been suppressed, for under the circumstances as presented by the record, the right of Boyd to recover appears to be entirely independent of the fact whether Pharr & Beck had actual notice or not.

But as the ruling of the court in refusing to suppress the deposition has been argued on both sides, and treated as an

important question, we propose to examine it. Two objections were made to the admission of this deposition; first, that the affidavit upon which the commission was granted does not disclose the christian name of the witness; and secondly, that the notice of the time and place of taking the deposition was insufficient. The affidavit discloses that she is a material witness, and that she resides about twenty-one miles from Talladega Court House. In the commission her christian name is given Mrs. Eliza Reese, and the notice also gives her name in full.

Now, conceding that it is necessary to make an affidavit before a commission to examine a female witness can be issued, yet we think this affidavit sufficient; it points with sufficient certainty to the witness intended to be examined, and this is all that can be necessary, especially when we see that the commission and notice so describes or identifies the witness, as to preclude the idea that the defendant could have been misled or injured by failing to insert her christian name in the affidavit. Nor is there any error in refusing to suppress the deposition, on the ground that the notice of the time and place of executing the commission was insufficient. In the case of Cullum v. Smith & Conklin, 5 Ala. 625, this court held that though the Circuit Court *might, under* peculiar circumstances, suppress a deposition which was regularly taken, yet its refusal to do so was the exercise of a discretion which could not be reviewed by writ of error. This authority is conclusive, to show that this objection cannot be sustained. There is nothing on the face of the commission, the notice or the deposition itself, to show that it was illegally or irregularly taken; nor does the evidence introduced upon the trial of the motion in the slightest degree impugn the regularity of the deposition. The question, therefore, whether it should have been suppressed or not, was exclusively one of discretion in the Circuit Court, and cannot be made the foundation of error in this court.

The only remaining question grows out of the admission of the record of a suit brought by Boyd against Bell, to recover of him the slaves conveyed by the deed of trust. It appears that the defendant was one of the attorneys of Bell in the defence of that suit, and the pleas to the decla-

ration in that case are signed by the defendant and Mr. White. The declaration, too, set forth the title of the plaintiff, and describes substantially the deed of trust by which the plaintiff derives his title to the slaves in controversy. That this record is a circumstance, tending to prove that the defendant had actual notice of the deed of trust before he purchased the slaves conveyed thereby, we cannot doubt. We cannot infer that the defendant never read the declaration, to which he as an attorney filed pleas; indeed, the legal intendment must be otherwise. It is possible that Mr. White, the defendant's partner, alone read the declaration, and filed the pleas in the name of White & Parsons as attorneys; but in the absence of proof on this subject, we must infer that the defendant read and knew the contents of the declaration; consequently, he was sufficiently apprised of the plaintiff's title before he bought the slaves, to put him on inquiry.

We can see no error in allowing the record to be read as evidence for this purpose, and consequently the judgment must be affirmed.

LUNDIE *vs.* COSPER.

1. Defendant having goods at A, contracted with plaintiff for the hauling of them to his house in Randolph county. Plaintiff agreed to start for the goods, with his wagons, on Sunday, but did not start until the following Tuesday. On arriving at A, he was informed, by the receiving and forwarding agent, that defendant's goods had been sent off ten days previously, and that he then had no goods at that place. Plaintiff brought assumpsit on the contract, and *it was held:*
   1. That the agent's statement, as to defendant's goods having been sent off ten days previously, was inadmissible, since it related to a past fact having no connection with the *res gestae.*
   2. That his statement that defendant then had no goods at A, was admissible, as showing an excuse for not complying with the order of his principal.
   3. That plaintiff was not justified in failing to start on the stipulated day, by the previous removal or shipment of the goods of which he had no notice; and that a charge which asserted the contrary was erroneous.

ERROR to the Circuit Court of Randolph.

Tried before the Hon. E. Pickens.

WHITE & PARSONS, for Plaintiff in error.

1. It is admitted, that the declarations of an agent which constitute a part of the *res gestae* are admissible; but this is the case *only*, "where the representation or statement of the agent is the *ultimate* fact to be proved, *and not an admission of some other fact.*" See 1 Greenl. Ev. § 113. Here the fact to be proven was, the failure or refusal of the rail road agent to deliver the goods when called for by the wagoner. If it is conceded this could be done by proving his declarations, it does not follow they are admissible to show what took place "ten days" before, because it did not constitute any part of his present act, and was not the *ultimate fact* to which the law refers. Bank of Baltimore v. Bateman, 7 Har. & Johns. 104. An agent is authorized to *act*, but he has no authority *to make confessions* after he has acted. See Mogill v. Kauffman, 4 Ser. & Rawle 317, 321. What was this, but a *confession* by the agent, that "he had sent off the goods ten days ago," instead of keeping them for Lundie's "own wagons," as he had been instructed? 7 Ala. 835.

3. The record sets out *all* the evidence; and it is evident the performance of this contract was to be commenced on Sunday. This is expressly forbidden by our statutes (see Clay's Digest 592 § 1, 593 § 2) under a penalty. It is a well established principle of law, that all *contracts contrary* to the *provisions* of *any statute are void.* Collins v. Blantern, 2 Wilson 374; Saltmarsh v. Tuthill, 13 Ala. 390; 10 ib. 566; 5 ib. 467; 11 ib. 885; 9 ib. 198. The charge excepted to is erroneous therefore, because it assumes that any recovery can be had under this contract. It is void, and the court should have instructed the jury accordingly.

3. But the charge is objectionable for other reasons. The rail road agent was instructed to retain the goods for Lundie's "own wagons," but he sent them off, *without his knowledge or consent*, ten days before Cosper reached there. This was an unauthorized act, which Lundie never ratified, yet the court tells the jury that he is liable, or assumes that he is, if the goods were thus sent off, &c. This was well calculated to mislead the jury, if it was not positively erroneous, and therefore the cause should be reversed. Cothran v. Moore, 1 Ala. 423.

4. This act being unauthorized by Lundie, it cannot be said he has put it out of his own power to perform the contract on his part; neither has he violated it first. The court therefore erred again, in assuming that Lundie is liable to Cosper, notwithstanding the failure of the latter to comply with the contract on his part.

HEFLIN, *contra;*

The consignment of the goods of plaintiff in error to the agent of the transportation department of the Georgia Rail Road Company at Atlanta, constituted him the agent of Lundie, especially in connection with the contract with Cosper, as shown by the bill of exceptions; such an agency is not different from any other agency. Story on Bailment, § 444.

The refusal of the agent to deliver the goods to Cosper, was an act, and his declaration, at the time of his failure or refusal to deliver the goods, was part of the *res gestae*; his acts and declarations, concerning business within the scope of his agency, are admissible in evidence against his principal. Story on Agency, § 134, 135, 136, 137; 1 Greenl. Ev. § 113, 114.

The decision of the Circuit Court was correct, even had the plaintiff's affidavit not been filed; but the filing of the affidavit prevented the operation of the statute of 1807. Clay's Digest, page 325, § 75. The decisions under this statute have not been uniform. Howard v. Wear, Minor Rep. 84; Curtis v. Gary, 118; Carter v. Dade, 1 S. Rep. 18. But none of them decide that the plaintiff shall be nonsuited, when the affidavit required by the statute is made, which was done in this case.

CHILTON, J.—This was an action of assumpsit, brought by Cosper against Lundie, to recover upon a contract, by which Cosper undertook to haul from Atlanta, Georgia, five thousand five hundred pounds of goods, wares and merchandize, to the store of Lundie, in Randolph county, at the price of one dollar per hundred pounds. There was a verdict and judgment for the plaintiff in the court below.

It appears from the bill of exceptions, that there was evidence conducing to prove that Lundie, having goods, &c., at Atlanta, employed Cosper to haul the same at one dollar per one hundred pounds, and that one of the terms of the contract was, that the latter should start with his wagons for the

goods on Sunday after the contract was made, but that he failed to start either on that day or the succeeding day; that he, however, started on the Tuesday following, and when he arrived at Atlanta was informed by the receiving and forwarding agent at that place, that Lundie had no goods there, and that they had been forwarded to him ten days previous to that time. This appears to have been done contrary to the instructions of Lundie, and on the agent's own responsibility.

What the agent said, as to the goods having been shipped ten days before they were called for by Cosper, was objected to by the plaintiff in error, but allowed by the court.

The jury were instructed, that if Cosper agreed to start on a particular day, and did not do it, but did start on a day subsequent, and that if the goods had been sent off by the agent, so that the plaintiff could not have obtained them by starting at the time agreed on, the defendant would be liable to the plaintiff for such damages as he had sustained by not obtaining the goods to haul, &c.

We are of opinion that the court mistook the law, both in the admission of the declaration of the agent, or warehouse man, that the goods had been shipped ten days before, and in the charge given to the jury.

The agent's admission, or declaration, related to a *past fact*, with which it had no connection, was not made in pursuance of any authority from the constituent, nor connected with any authorized act as explanatory of it, so as to constitute part of the *res gestae*. 1 Greenl. Ev. § 113; Williams v. Hackelford, 16 Ala. Rep. 318; 24 Eng. C. L. Rep. 112; 5 ib. 454; 17 ib. 133; 24 ib. 353; 28 ib. 273. In this case, the agent's reply to the party presenting the order for the goods, that there were none there belonging to Lundie, was admissible; for that was a part of the transaction, and necessary in order to show his failure to comply with the order of the principal; but that portion of his declarations, relating to a transaction which had taken place ten days before, is not evidence to prove the past fact to which they relate. They constitute hearsay evidence merely, and as such, were improperly received by the court below.

The charge of the court cannot be supported, because it

assumes that the plaintiff below was justified in violating his contract to start on a particular day, by reason of the removal, or previous shipment, of the goods of Lundie, when it appears that he was not informed of such shipment, and could not, therefore, have made it the ground of his non-compliance, and when, if he had started with his wagons on the day agreed upon, *non constat*, Lundie might have procured freight. As we understand the contract, Lundie was to furnish five thousand five hundred pounds freight, to be hauled by the plaintiff from Atlanta to defendant's house, in Randolph county, and this freight was to consist of goods, wares and merchandize. Lundie was not bound to furnish the goods which he had bought at Charleston, or any other designated goods which Cosper was to freight, but he could have purchased them on the day of the arrival of the wagons, and had them ready for shipment, and thus have complied with his contract. So that it is clear, the previous shipment of the goods, even had the fact been known to Cosper, would not have justified a violation, on his part, of the contract. We cannot *judicially* know that Lundie would not have had the amount of freight agreed on at Atlanta, had Cosper started on the day he agreed to start for it; and if the contract was, as the charge assumes, and as the evidence conduced to prove, that Cosper was to start for it on Sunday, and he refused to start until Tuesday, he was the first to violate the contract, and this justified Lundie in abandoning it on his part. See Greene v. Linton, 7 Por. 133; Martin v. Chapman, 6 Por. 344; Davis v. Wade, 4 Ala. Rep. 208; Pharr & Beck v. Batchelor, 3 Ala. Rep. 237.

These views are sufficient to guide the primary court in the future progress of the cause, and show that the judgment must be reversed and the cause remanded.

GOWEN & CO. ET AL. *vs.* JONES.

1. When the defendant contests only a part of the plaintiff's demand, and asks a continuance of the cause, the court may require a confession of judgment for the sum admitted to be due, and grant a continuance as to the residue.
2. If execution issues for the amount of the judgment confessed, and it is satisfied by the defendant, he cannot move to strike the case from the docket, nor take advantage of the payment by pleading a former recovery *puis darrein continuance.*

ERROR to the Circuit Court of Montgomery.

Tried before the Hon. Robert Dougherty.

Jones sued Gowen & Co. and another, in the Circuit Court on a bill of exchange. The action was assumpsit, and the bill on which it was founded was drawn by Gowen & Co. and McRea on Mauldin & Terrill, for one thousand dollars. No pleas appear in the record until the fall term of said court, 1850.

At the fall term, 1849, the record shows that the defendants confessed judgment for eight hundred and fifty dollars, "part of the amount in controversy between the parties," and the cause was continued for the balance.

At the fall term, 1850, as appears by the bill of exceptions, the defendants moved to strike the case from the docket, and to support the motion, showed that at the fall term, 1849, the defendants moved the court for a continuance, on the ground of usury to the extent of one hundred and fifty dollars, and in order to get a continuance, were required to confess a judgment for the sum of eight hundred and fifty dollars, part of the demand sued for, and the entry is copied in the bill of exceptions; and it was proved that execution had issued on said judgment, and the money had been paid thereon by the defendants, within six months after the rendition of said judgment. The motion was overruled, and the defendants excepted.

On the trial, the defendants proved the same facts, under a plea of former recovery, pleaded *puis darrein continuance*, and asked the court to charge the jury, that no further recovery could be had, if the jury were satisfied of the existence of

the fact proved. The court refused the charge, and the defendants excepted.

The defendants then asked the court to charge the jury, that if they found the facts as above set forth, the plaintiff could recover no further damages; which was also refused, and defendants excepted.

The denial of the motion, and the refusal to charge as requested, are here assigned for error.

WATTS, JUDGE & JACKSON, for plaintiffs in error.

WHATLEY, *contra.*

LIGON, J.—Under the view taken of this case by a majority of the court, it will be needless to examine whether the question involved was rightly raised in the court below, by motion to strike the case from the docket, or under the plea of the former recovery, as they hold it could not avail the plaintiffs in error in either form.

The case of Henderson v. Henry, 6 Ala. Rep. 361, is considered as having settled the practice in this State, as it was ruled in the court below; and doubtless, under the authority of that case, a practice, which, at the time of that decision, was only partially indulged, has now become general, and great mischief might result from changing it.

I must confess, however, that I have looked in vain for a precedent, or an authority, to sustain it, and I have but little favor for a judgment confessed to procure a continuance of part of the cause, or the imposition of such terms, by the courts at *nisi prius*, as conditions for their favors.

I regard the able arguments of the Chief Justice and Mr. Justice Parsons, against this practice, in the case of Edwards v. Lewis, 18 Ala. Rep. 494, as unanswerable, and as leading to the only correct legal conclusion on the subject. But as a majority of my brethren hold the contrary, and think the court below had the power to require a confession of judgment, as to part of the demands due on, and to continue the case as to the remainder, the judgment of the Circuit Court must be affirmed.

MATTHEWS *vs.* ROBINSON.

1. Defendant sold and delivered to plaintiff a slave, in consideration that plaintiff would pay all the debts then owing by defendant. Plaintiff afterwards commenced suit by attachment against C., to whom, at the time of the sale, defendant was indebted in the amount of a decree previously rendered against him in the Court of Probate in favor of C., and defendant was summoned as garnishee, and suffered judgment to be rendered against him, on which execution was afterwards issued. *It was held,*

That the execution could not be set aside, and satisfaction of the judgment be entered, on proof of this agreement.

ERROR to the Circuit Court of Wilcox.

Tried before the Hon. Robert Dougherty.

This was an appeal, from the refusal of a justice of the peace to quash an execution, issued on a judgment rendered by him in favor of Robinson against Matthews, as garnishee of one Commander. The motion to quash was predicated on the ground, that the judgment had been satisfied before the issuance of the execution. In support of the motion it was proved, that Matthews had sold and delivered to Robinson a slave, in consideration that he should pay all of his (Matthews') debts; that Matthews was at that time owing a decree to one Commander, which had been previously rendered against him in the Court of Probate; that Robinson afterwards commenced suit by attachment against Commander, and Matthews was summoned as garnishee; that before judgment was rendered against Matthews as garnishee, it was understood between him and Robinson, that he should allow judgment to be rendered against him, so that Robinson might not be compelled to pay the entire decree which Commander had previously obtained against Matthews, but might retain part of the amount in his own hands; that Matthews answered, admitting an indebtedness, and a judgment was accordingly rendered against him for the amount. An issue being submitted to the jury, the court charged them that, although Robinson, under his contract, might be bound to pay the decree against Matthews in the Court of Probate, yet if Matthews had allowed judgment to be rendered against

him as garnishee, with the understanding above stated, they must find the issue in favor of the plaintiff in execution.

A. P. BAGBY, for plaintiff in error.
JENKINS, *contra.*

GOLDTHWAITE, J.—There was no error in the charge. If the agreement by the defendant in error, to pay all the debts of Matthews, could have been set up by the plaintiff in error, to protect himself against the rendition of the judgment against him as garnishee, he did not insist upon it, but allowed judgment to go against him. This judgment, so far as this motion is concerned, is conclusive. The summary remedy substituted by our practice in the place of the *audita querela* cannot go behind it. Burt v. Hughes, 11 Ala. Rep. 571.

The judgment must be affirmed.

WILKERSON, Admr. *vs.* VINSON.

1. The Court of Probate has not jurisdiction to compel an administrator to convey his intestate's interest in certain lands, which were sold by a firm in which the intestate was a partner, unless the intestate had entered into "bond or obligation to make title thereto."

ERROR to the Court of Probate of Russell.

A petition was filed in the Probate Court of Russell by Vinson against Wilkerson, administrator of Daniel McDougall, deceased, setting forth that a certain half section of land, situated in Russell, had been previously sold to the firm of James C. Watson & Co. by Tulse Tohola, and that the contract of sale had been approved by the President of the United States; that petitioner afterwards purchased these lands from James C. Watson & Co., and that the purchase money had been paid to Daniel McDougall, who was one of the firm or company of James C. Watson & Co.; that after such purchase and payment, McDougall departed this life, without having made to the petitioner title to the land, or

transferred the *approved contract*, as it was alleged was the agreement, that a patent might issue to the petitioner; that Alex. J. Robinson and James C. Watson were the other partners; that James C. Watson was dead, and his executor, John H. Watson, had transferred his interest to the petitioner, and that the other partner, Alex. J. Robinson, had also transferred his interest; and upon this state of facts the petitioner prays the Probate Court, to grant an order compelling the said Wilkerson, administrator of McDougall, to transfer to him the approved contract aforesaid, with a request that a patent may issue to the petitioner.

The petition was demurrred to, and the court overruled demurrer; and at the hearing, the facts of the petition being established by proof, the Probate Court granted such an order as that prayed for.

The overruling the demurrer and the decree of the court are assigned for error.

G. D. Hooper, for plaintiff in error.

Belser, *contra*.

PHELAN, J.—The jurisdiction of the Probate Court, "to compel an executor or administrator to make titles," upon petition filed in that court, is limited by the words of the statute (Clay's Dig. 157, § 38) to cases were persons owning lands sold them, and entered into "bond or obligation to make titles thereto," and died without making titles. In such a case, the executor or administrator can be compelled to make titles agreeably to the "bond or obligation given by the decedent."

It would be extending the jurisdiction thus conferred entirely beyond its proper limits, to hold that under this statute the Probate Court is competent to act in such a case as that presented by the record. Here there was no "bond or obligation to make titles," nor even a written agreement to make a transfer of the "approved contract" on the part of McDougall, the decedent, to the petitioner. See Griggs v. Woodruff, 14 Ala. 9.

The court was without jurisdiction in the case; its decree is reversed, and it is not necessary to remand.

KING & CO. *vs.* HILL.

1. A *cestui que trust* of personal property cannot interpose a claim under our statute to try the right of property.

ERROR to the Circuit Court of Madison.
Tried before the Hon. George D. Shortridge.

An execution in favor of the plaintiffs in error was levied on certain slaves as the property of James W. Hill, the defendant in execution. A claim was interposed by the said James W. Hill in the name of his infant daughter, Mary Hill, and as her next friend, and bond given to try the right of property agreeably to the statute. On the trial of the claim suit the claimant introduced two deeds as evidence, each of which conveyed a part of the negroes in controversy to the said James W. Hill, as trustee, for the sole and separate use and benefit of his said infant daughter, Mary Hill. One of these deeds directs the trustee "to take charge of, hire, manage, control and direct" the slaves conveyed by it, "in that way which the trustee may deem most beneficial for his said daughter." The other provides that the trustee "shall take possession of the said slaves, and apply all profits arising from them and their future increase to the exclusive use, benefit and support of the said Mary Hill." The plaintiffs objected to the admission of each one of these deeds, but their objection was overruled, and they excepted. The plaintiffs asked the court to charge the jury "that said deeds, if valid, conveyed the legal title to the slaves in controversy to the said James W. Hill, in whose name alone the claim to said slaves could be made or sustained; and that upon said evidence the jury could not find the issue for the claimant." This charge the court refused to give, but charged the jury "that the beneficial interest being in Mary Hill, they might find for the claimant," to which plaintiffs excepted.

The admission of the deeds, the refusal to charge as requested, and the charge given are assigned for error.

C. C. CLAY, Jr., for plaintiffs in error.

1. The deeds from Williamson and Thompson conveyed

the legal title in the slaves to James W. Hill, the trustee. He was to take possession and keep it, at least during Mary's life. Consequently the deeds did not show such title in the claimant as made them admissible evidence under the issue. The proof must correspond with the allegations of the pleadings. The claimant alleged substantially that the property was hers: while the deeds showed that it was James W. Hill's. In regard to trust property, the legal title is in the trustee, who may, at law, recover the property from the *cestui que trust.* The *cestui que trust* cannot sue at law.—Gunn, Trustee v. Barrow, 17 Ala. Rep. 743; Marriott & Hardesty v. Givens, 8 ib. 694; Bissell & Carville v. Lindsay *et al.* 9 ib. 162; 14 Conn. 445 ; 8 Leigh, 604.

Where property is conveyed in trust for others, the trustee is regarded at law as the legatee, and the *cestuis que trust* are not necessary parties to a settlement of the administration.—Gaunt & Wife v. Tucker's Ex'rs, 18 Ala. Rep. 27.

2. In a claim suit the claimant cannot show an outstanding title in a stranger to defeat the execution.—Foster v. Smith, 16 Ala. Rep. 192; Frow v. Downman, 11 ib. 880; McGrew v. Hart, 1 Porter, 175.

D. C. Humphreys, *contra:*

The deeds were properly admitted in evidence, their execution having been duly proven. Under them Mary Hill has a present right of present enjoyment. The right of property is in her by the terms and provisions of the deeds, for she is entitled to the sole use of the hires and profits of the slaves, and this use and benefit draws the right of possession, which right of possession gives the right of property.—Cook & Kennerly v. Smith, 12 Ala. Rep. 42.

In Strode *et al.* v. Clarke, 12 Ala. Rep. 621, the trial of the right of property was in the name of the infant by *prochein ami.* In McGrew v. Hart, 1 Porter, 175, the property belonged jointly to the claimant and another, and it was determined that when the claimant possesses an immediate interest in the property, this would authorize the interposition of his claim to show that defendant in execution *had none.*

In Graham v. Lockhart, 8 Ala. Rep. 9, it was held that the bond, required in a claim for a trial of the right of property,

may be given by one beneficially interested in the property. The fact that there is a trustee named in the deeds, will not prevent the beneficiary, who has the sole right to the use, enjoyment and benefit of the property, from availing herself of the provisions of the act, which was designed and intended for the speedy re-possession of property taken from its rightful owner. Suppose the trustee unwilling or unable to give bond for the trial of the right of property, surely the infant is not to be driven to the tedious and expensive remedy of a suit in equity.

DARGAN, C. J.—The sole question presented by the bill of exceptions is this: can the *cestui que trust* of personal property interpose a claim under our statute to try the right of property? I am fully satisfied that he can not. A court of law can look alone to the legal title—it cannot take cognizance of a trust; and looking alone to the legal title in the case before us, we find it in James W. Hill—not in the claimant; therefore her claim cannot prevail.

It has however been contended, that the previous decisions of this court warrant the ruling of the Circuit Court, and we are referred particularly to the case of Carleton & Co. v. Banks, 7 Ala. Rep. 32. But upon an examination of that case it will be found, that the slaves were conveyed to a trustee, with directions in the deed, to permit the beneficiary to have and retain the possession of them during her natural life, and to have and enjoy the profits thereof; and in pursuance of this deed, it appears that the slaves had actually come into the possession of the beneficiary and her husband, before they were levied on, and the claim was put in by the trustee. The court held that the deed did not create a separate estate in the wife, and that as the slaves *were in the actual possession of the husband*, they were liable at law for his debts. This is the substance of the whole case, and I fully agree with the court in the conclusion to which they came; though I admit that there is language used in the opinion delivered in that case, which, if not confined to the facts of it, would seem to hold doctrine which I could not sanction.

In the case before us however, the record expressly informs us that James W. Hill, the trustee, was in possession of the

slaves at the time of the levy, and neither of the deeds directs him to deliver the slaves to the claimant, or to permit her to have the possession of them. Under these circumstances, if we were to hold that Mary Hill, the claimant, had the legal title, we should break down the title of the trustee before the trust was executed. This no court can do, without a total disregard of the well settled rules of law.

I have examined all our decisions—I do not think any of them have escaped my search—and I have found none that countenance the idea that a *cestui que trust* can interpose a claim to property, and try the right at law, in his own name; but on the contrary, they seem to indicate the settled opinion of the court, that the claimant must show in himself a legal, and not a mere equitable title. In the case of Robinson & Caldwell v. Mauldin, 11 Ala. Rep. 477, it was said, that "when a trustee refused to make the affidavit, and take the steps necessary to the trial of the right of property, the *cestui que trust* may resort to equity to enforce the trust and protect his rights. And it it is well settled, that a mortgagee or trustee in a deed to secure debts, who has not the actual possession of the property, cannot interpose a claim *before the law day of the deed*, to try the right of property at law; and if the property be levied on *whilst* in the possession of the grantor, and before the deed is perfected, the mortgagee or trustee must resort to a court of equity to protect his rights;" thus showing clearly, to my mind, that this court has never countenanced the doctrine, that one who has an equitable title alone can interpose a claim in his own name, and succeed by showing a legal title in another for his use.

It is better to hold on to the plain landmarks that separate the jurisdiction of a court of law from that of a court of equity, than to overstep them to reach the justice of particular case; and we must hold that the court erred, as well in refusing the instruction prayed, as in the charge that was given.

Let the judgment be reversed, and the cause remanded.

McLEMORE *vs.* MABSON, ET AL.

1. An outstanding title to dower is such an incumbrance on land as will authorize a purchaser, who has contracted for a good and lawful title, to refuse to perform an executory contract for its purchase.
2. If the vendee has received a deed, and its covenants are broken by the existence of an outstanding incumbrance, it is competent for a court of equity, when the vendor is insolvent, to restrain the collection of so much of the purchase money as will compensate for the injuries resulting from the breach, or to order it to be appropriated to the extinguishment of the incumbrance.
3. But when the vendee has received a deed with covenants, and has executed a mortgage on the land to secure the payment of the purchase money, he cannot resist a foreclosure of the mortgage in equity, by setting up in his answer that the vendor has broken the covenant in his deed, it not being shown that the vendor is unable to respond to the damages occasioned by the breach.

ERROR to the Chancery Court at Montgomery.

Tried before the Hon. J. W. Lesesne.

Bill by the defendants in error against McLemore, to foreclose a mortgage given by him on certain lands, which he had purchased of the complainants, and for which he had received their deed with covenants of warranty; the mortgage being a security for the purchase money. McLemore by his answer insists that the land is incumbered by the dower of the wife of the complainant's father, who was the former owner, and that previous to the sale to him, one of the complainants had witnessed a deed made by a subsequent husband of Mrs. Mabson, (the elder Mabson having died) by which such husband purported to convey to one Houghton the said dower interest. It does not appear that the dower had ever been assigned, or that any one had actual possession of the land. McLemore contended for an abatement of the purchase money, on account of this incumbrance; but the chancellor refused to go into the inquiry, and decreed a foreclosure, directing the mortgage debt to be ascertained, without regard to the alleged incumbrance.

J. & J. WILLIAMS, for the plaintiff in error.

1. Dower is such an incumbrance on land as will authorize a purchaser who has contracted for a good and lawful title, to

refuse to perform the contract. Parks v. Brooks, 16 Ala. Rep. 529, and the authorities there referred to.

2. The chancellor erred, in refusing to allow the defendant below to set off the value of the dower of Mrs. Pitts; inasmuch as upon a decree to account both parties are equally actors, 2 Story's Eq. Jur. § 1433, p. 815; and this especially, because in this case the deed of conveyance had already been executed, and a large portion of the purchase money paid before the defective title was discovered; and there being a connection between the demands of the parties, equity acts upon it, and allows a set off, 2 Story's Eq. Pl. § 1434, page 658; and to prevent multiplicity of suits; and vendee has the right to pay off and discharge incumbrances, and to set them off.

3. The value of the dower estate is a proper subject of set off in this case, *because of mutual credit* between these parties, and *vide* Beaseley v. Archy, 2 Schoal & Lefroy, 403, n.; 2 Story's Eq. Jur. from § 1434 to § 1436, inclusive, 3d ed.; and where the offset grows out of the same transaction, equity will give relief. See 4 J. J. Marshall, 190, Lewis v. Forbes; and 2 A. K. Marsh. 260, Step. v. Atkin; and it is not necessary to file cross bill; facts set forth in answer sufficient. Jennings v. Webster, 8 Paige, 503.

ELMORE & YANCEY, *contra.*

1. The complainants have a clear right to sell such interest as McLemore had in the lands derived from them, and they ask for no more.

2. The answer shows that the deed of complainants to McLemore for the lands had been executed and delivered, before the mortgage was made. The contract is, then, executed, and McLemore must look to the covenants in this deed for his protection. Cullum v. Branch Bank of Mobile, 4 Ala. Rep. 21.

3. If there be a defect of title, then McLemore cannot rescind on this ground, unless there be some supperadded equity, as the insolvency of complainants.

4. The answer says, complainants' deed contains covenants of title. There is no covenant against incumbrances, and the answer also shows that the defect of title alleged is the dower

of the widow of complainant's father, which is only an incumbrance, and not covered by their covenants in the deed.

5. And the equity of the defendant must arise from the breach of a covenant; and we insist, there must also be no remedy thereon, because of the insolvency of the grantors, or there is no equity of the defendant which he can assert in this suit.

CHILTON, J.—It is clear that dower is an incumbrance, such as will authorize a purchaser, who has contracted for a good and lawful title, to refuse to perform an executory contract for its purchase. Parks v. Brooks, 16 Ala. Rep. 529. But this principle does not aid the plaintiff in error. Here the contract has been consummated by the execution of a conveyance with covenants of warranty as to title, which conveyance has been accepted by him, and he has mortgaged the land to the complainants. It is true, if the covenants in his deed are broken by the outstanding incumbrance, he has a right either to sue at law upon his covenants, or to resort to a court of equity if the incumbrance was concealed from him, to have a prompt removal of it by the vendor, or, on default of such removal, he is entitled to a rescission of the contract. It is also settled, that notwithstanding the vendee has received a deed, if its covenants be broken by the existence of an outstanding incumbrance, and the vendor is insolvent, then it is competent for the court of equity to restrain the collection of so much of the purchase money, as will compensate for the injury resulting from the breach, or it may order it to be appropriated to the extinguishment of the incumbrance, so as to protect the grantee. Cullum v. The Br. Bank, 4 Ala. Rep. 21.

In this case we will not undertake to say what relief, if any, the plaintiff in error is entitled to on a proper application. We think it very clear, he cannot resist the foreclosure of the mortgage, upon the ground that the mortgagees have broken the covenants in their deed to him, and raise this question upon his answer. It has frequently been held by this court, that a defendant, by his answer, cannot pray any thing but to be dismissed the court, and if he has any relief to seek, or discovery to ask, he must do so by bill of his

own. Cullum v. Erwin, 4 Ala. Rep. 452; Harris v. Carter, 3 Stew. Rep. 233; Cummings v. Gill, 6 Ala. Rep. 562. We say nothing as to whether the defendant could file a cross bill; or whether, if the complainants below had been averred in the answer to be insolvent, and that the defendant had an equitable set off growing out of the transaction, by reason of the breach of the complainant's covenants against incumbrances, or for warranty of title, he might not be allowed to avail himself of such set off by his answer, as a defence *pro tanto* to the mortgage demand. The case calls for no opinion upon these points, as the facts averred in the answer do not bring the defendant within the influence of either of these supposed grounds for relief. So far as this record discloses, the complainants are fully able to respond at law for any injury the defendant may have sustained by the breach of the covenants of his deed, and he therefore lays no predicate for an equitable set off, if one could be allowed without a cross bill. See Goodwin v. McGehee, 15 Ala. Rep. 233.

We are of opinion, that the defence set up by the answer interposed no objection to the foreclosure of the mortgage, in the form in which it was presented.

The decree is consequently affirmed.

BRANCH BANK AT MOBILE *vs.* COLEMAN.

1. When the record shows that the plaintiff in the judgment, on which the execution issued which was sought to be superseded, was a party to the proceedings had upon the *supersedeas*, it cannot be assigned for error, that he had no notice of the proceedings.
2. When an issue is formed on the facts set forth in a petition for a *supersedeas* of an execution, it may properly be submitted to a jury for decision.
3. When an accommodation endorser of a note, on which judgment is recovered against him, files his petition for a *supersedeas* of an execution issued thereon, alleging satisfaction of the judgment, and issue is taken upon the facts set forth in the petition, the party, for whose accommodation he endorsed the note, may be rendered a competent witness for the petitioner by the execution of a release to him by the latter previous to the trial; and it is no objection to the release that it was delivered to the witness by the petitioner's attorney,

when it is shown, that after its delivery, the petitioner acknowledged that he had released the witness.

4. Parol proof is admissible to show the intention of the parties to a note at the time the contract was entered into, with regard to their several liabilities among themselves, and the relations which they were to bear to the note.
5. The proceeding by petition and *supersedeas* is not strictly a proceeding *at common law*, but it may properly be regarded as a substitute for *a bill in equity*, when the matter of discharge set forth in the petition does not appear in the record; when, therefore, the matter relied on by the petitioner would form a good equitable satisfaction of the judgment, which the execution is used to enforce, it may be inquired into in this way, and the execution perpetually superseded.
6. A petition for a *supersedeas* of an execution may be verified by the oath of an agent.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. John Bragg.

The plaintiff in error obtained a judgment against the defendant in the County Court of Mobile, in February, 1840, for $1648 48. This judgment was founded on a note made by one Livingston, and endorsed by defendant and Gayle & Bower. An execution, which appears to be a *pluries fi. fa.*, issued on said judgment on the 14th February, 1846, and was levied by the sheriff of Dallas county on certain lands as the property of the defendant.

After the levy, the defendant filed his petition for *supersedeas*, setting forth that he was only accommodation endorser on the note; that he became such at the instance and request of Gayle & Bower, for whose benefit the note was made; that said Gayle & Bower had made some arrangement with the plaintiff, by which the judgment against the defendant was fully satisfied, although such satisfaction does not appear of record; that no execution ever came to the hands of the sheriff, except the one sought to be superseded, although two writs of *fi. fa.* had been made out by the clerk, the one on the 9th April, 1840, and the other on the 11th August, 1840, but that both of these writs were retained in the clerk's office. For the two reasons, thus set forth, he prays that the writ of *fi. fa.*, then in the hands of the sheriff, be superseded and quashed.

On this petition a *supersedeas* issued, and at the Fall Term, 1850, Richard W. Gayle, by leave of the court, files an an-

swer, on oath, to the petition, in which he sets out that he is the real owner of the judgment on which the *fi. fa.* issued, having paid the bank a valuable consideration therefor, and received an assignment of the same.

He denies that Gayle & Bower, or any party to the note or judgment, have ever paid and satisfied either. He alleges that executions did issue on the judgment in a year and day after its rendition. Though the plea is interposed by Gayle, the proceedings are carried on in the name of the Branch Bank at Mobile.

On this answer an issue was formed, and submitted to a jury at the March Term, 1851. It was found for the petitioner, and the court adjudged that the *supersedeas* be made perpetual, and that the petitioner recover his costs.

On the trial in the court below, as appears by the bill of exceptions, the petitioner introduced Bower, one of the partners in the late firm of Gayle & Bower, who deposed that he had no interest in the event of the suit, that the petitioner had executed to him a release, under seal, of all liability to him, which had been delivered to witness before his examination at a previous trial of this cause, by one of the petitioner's counsel; it was also shown that the petitioner had said that he had released Bower. The respondent objected to the competency of the witness, because the release executed to him had not been delivered to him by any person who had authority to do so; and for this cause only. The objection was overruled by the court, and the witness was allowed to testify. It was then proved, by parol, that the note, on which the judgment and execution were founded, was made by Livingston, and was endorsed by the petitioner for the accommodation of Gayle and Bower, who negotiated it, and that he received no consideration whatever for his endorsement.

Evidence was also offered, tending to show that the settlement made with the Bank, apparently by Richard W. Gayle, was in fact made by Billips Gayle, one of the partners of Gayle & Bower; that said settlement extended to all the debts of Gayle & Bower, including this debt of Coleman; and that the Branch Bank accepted the lands offered in the proposition found in the record, in full satisfaction of these claims.

Evidence was also admitted tending to show that the whole negotiation with the Branch Bank was conducted by Billips Gayle, and that the lands conveyed to the Branch Bank in fact belonged to Gayle & Bower, having been bought and paid for by them, though the paper title was in the name of Richard W. Gayle, who knew nothing of the negotiation while it was pending. To this evidence the respondent also excepted, but the court allowed it to go to the jury. The respondent excepted to the ruling of the court in allowing the evidence to go to the jury.

It is here assigned as error, 1st. That the court erred in proceeding on the *supersedeas*, and rendering it perpetual, without notice to the bank; 2d. In submitting the facts to a jury; 3d. In permitting Bower to testify; 4th. In permitting parol testimony to vary or control the written liabilities of the parties, as they appeared on the note; 5th. In permitting parol testimony, in a court of law, to show a resulting trust in favor of Gayle & Bower in the lands to which Richard W. Gayle had the legal title; 6th. In proceeding on the *supersedeas*, when it appears to have been applied for by an agent.

John T. Taylor submitted the case on the part of the plaintiff in error, without brief or argument.

Wm. G. Jones for defendant.

LIGON, J.—1. The first assignment of error cannot be sustained, as the record and proceedings in the case show, throughout, that the Branch Bank at Mobile was a party to the proceedings in the court below, and to presume that it had no notice of them, would be to presume against the record, which cannot be allowed; and its assignee of the judgment had the right to use its name in litigating the matter set forth in the petition for *supersedeas*. Edwards v. Lewis, 16 Ala. Rep. 813.

2. When an issue is formed on facts in the Circuit Court, a jury may be empannelled to try it, and, indeed, such method of trial is the only correct one in that court, unless it appears from the record, that the parties consented to substitute the judge for the jury, or in cases in which a demurrer to testimony is interposed. The petition for the *supersedeas*

in this c se sets out two reasons for quashing the execution, first, that the judgment had been satisfied; and second, that no execution had been issued in a year and a day from the rendition of the judgment, so that the one sought to be quashed, issuing after that time, was irregular. Both these grounds are distinctly traversed and denied by the answer of the respondent, thus presenting two issues of fact, which the court might well submit to be tried by a jury. Dunlap v. Clements, 18 Ala. Rep. 778; Edwards v. Lewis, 16 Ala. Rep. 813.

3. There was no error in permitting the witness Bower to testify, under the circumstances disclosed in the bill of exceptions. He was, it is true, one of the firm of Gayle & Bower, for whose accommodation the petitioner endorsed the note on which the judgment was founded; but, it appears, the petitioner had released him from all liability on this account before he was sworn. It is no objection to the release, that it was delivered to the witness by the counsel of the petitioner, for we must presume he was the agent of the petitioner for that purpose, especially as it is shown the petitioner declared to others, after its delivery, that he had released the witness.

4. We cannot well see to what portion of the record the fourth assignment of error is intended to apply, but apprehend that it relates to that part of the testimony which goes to prove, that although the petitioner appears to be first endorser on the note, yet, he only occupies the position of accommodation endorser, and that Gayle & Bower, though they appear last on the note, are the parties primarily liable, according to an agreement between them and the petitioner, at the time of the endorsement. It is clearly competent to show, by parol, the intention of the parties at the time the contract was entered into, with regard to their several liabilities among themselves, and the relation which they were to bear to the note. For this purpose, the testimony was allowed in this case, and we regard it legitimate.

5. The court allowed the petitioner to show, by parol, that the real estate which the Bank accepted, in satisfaction of all the debts due to it by Gayle & Bower, belonged to them, and not to Richard W. Gayle, to whom the deeds were made, and in whose name the negotiation with the Bank was car-

ried on by Billips Gayle, in the absence, and as far as the proof discloses, without the knowledge of Richard. This testimony was pertinent to the issue, and it would be difficult to conceive by what evidence a secret, and resulting trust could be established, were parol proof to be excluded. Gayle & Bower were the equitable owners of the lands conveyed by Richard W. Gayle to the Bank; their equity was a perfect one, and Richard W. Gayle held only the naked legal title. When, therefore, it was used to pay the debts of Gayle & Bower, with their consent, and by his sanction, the trust which had been reposed in him, by his having been invested with the legal title, was fully executed; and if he afterwards attempts to set up this legal title, for the purpose of claiming an unjust benefit, which might result from his having once possessed it, the party from whom he seeks to obtain it may show by parol, that he held it only in trust for others, and that it has been devoted to the purposes of that trust.

The proceeding in this case, in the court below, cannot be regarded as a preceeding at common law, in the strict sense of that term. It is substituted, in our practice, for the writ of *audita querela*, and the same rules which governed the one, must regulate the other, with but slight exceptions. Lockhart v. McElroy, 4 Ala. Rep. 572; Edwards v. Lewis, 16 Ala. Rep. 813; Dunlap v. Clements, 18 Ala. Rep. 778; Rutland v. Pippin, 10 Ala. Rep. 469. This writ, and the proceeding on which it was founded, were in the nature of a bill in equity; (1 Bac. Ab. 307; 2 Black Com. 405); and the ground of the jurisdiction to award it is said be, the power and duty of all courts to prevent the abuse of their process, where an improper, or unjust use is attempted to be made of it, (Lockhart v. McElroy, supra); indeed, it may be properly regarded in all instances, in which the matter of discharge insisted upon in the petition does not appear on the record, as a substitute for a bill in equity. Great latitude must, therefore, be allowed in making up the issue, and a corresponding latitude extended to the proof under such issue. So, that, even, if the matter relied upon by the petitioner would form a good equitable satisfaction of the judgment, which the writ of execution is used to enforce, it may be

inquired into in this way, and the execution perpetually superseded.

6. It is also objected, in this case, that the petition for *supersedeas* was verified by the agent. This objection cannot be allowed to prevail. The statute which authorizes the Circuit Court judges to grant writs of *supersedeas* in vacation, is in these words; "The Judges of the Circuit Court, respectively, shall have power and authority, in vacation, to supersede any execution, when it shall satisfactorily appear to them, or any of them, that the same shall have improperly issued from the clerk's office of any of the Circuit Courts of this State." (Clay's Digest, 208 § 38.) It is not required that the petition presented should be verified by the oath of the person in whose name, and on whose behalf it is filed; but it is sufficient, if the judge to whom it is presented is satisfied, that the execution has improperly issued; and any person who knows the matters set forth in the petition to be true, may verify it. Were it otherwise, many instances might occur of payments by agents, whose knowledge upon the subject would be ample, when the principal could only swear as to his belief; and these cases might happen with non-resident defendants, who have property and agents in this State, and whose absence at the time of the levy of a *fi. fa.* on a satisfied judgment, might result in their being compelled to pay its amount a second time.

We find no error in the record, and the judgment must be affirmed.

BRATTON *vs.* McGLOTHLEN.

1. When the service of an original attachment is only made by the summons of a garnishee, it is erroneous to render judment against the defendant in attachment, until the garnishee has admitted a debt due, or property in his hands, or until a final judgment has been rendered against him for his default.

ERROR to the Circuit Court of Marshall.

Tried before the Hon. L. P. Walker.

In this case the attachment was executed by the service of a summons of garnishment by a constable. The record does not show that the garnishee ever answered, or that any judgment was entered against him. A judgment by default against the defendant in attachment was rendered by the court below, to reverse which he prosecutes a writ of error to this court.

WYETH & ADAMS, for plaintiff in error.
No Counsel for the defendant.

GOLDTHWAITE, J.—The service of the attachment in this case having been made only by the summons of a garnishee, it was erroneous, had the service been regular, to render a judgment against the defendant in attachment, until the garnishee had admitted a debt due, or property in his hands, or until a final judgment had been entered for his default. 7 Ala. 715; 9 ib. 211.

The disposition of the case on this ground renders it unnecessary to consider the other assignments.

The judgment is reversed, and the cause remanded.

TOWNES & NOOE, EXECUTORS, &c. *vs.* FERGUSON.

1. A sole executor may, by his admission, remove the bar of the statute of limitations, and revive a cause of action against the estate which he represents; and his admissions will bind the estate after his death.
2. An admission made by a sole executor, after the statute of limitations had completed a bar, in these words, "The account is a good one, but I cannot pay it before January, at which time I will be receiving money for the hire of negroes.,' *Held* sufficient to remove the bar of the statute, and to revive the cause of action against the estate.

ERROR to the Circuit Court of Franklin.
Tried before the Hon. L. P. Walker.

This was an action of *assumpsit* on a store account, brought by Ferguson, use, &c., against I. S. Helms as Ex'r of Peter Walker, dec'd.

The defendant pleaded, 1. Non Assumpsit; 2. The Statute of limitations of three years. To the plea of the statute of

limitations the plaintiff replied a subsequent promise by the executor, Helms, and the parties joined issue.

In the progresss of the cause the defendant Helms having died, the plaintiffs in error as his executors were made parties.

It appears from the bill of exceptions, that the store account was contracted in the year 1841, by Walker. In the year 1847, one Carter, a witness] for plaintiff, whose testimony was before the court in the form of deposition, called upon Helms, who was then executor of Walker, as the agent of Baker the holder of the store account, and presented to him the account, requesting payment. The deposition then reads as follows: Said Helms, so far as I can recollect, used these words in relation to the payment of said account: "The account is a good one, but I cannot pay it before January, at which time I will be receiving money for the hire of negroes." This was all the testimony introduced by the plaintiff.

John A. Nooe then testified in behalf of defendant, "That sometime, perhaps in the year 1847 or 1848, before the institution of this suit, Helms, who was then the acting executor of P. Walker, deceased, and Samuel Baker, for whose use this suit was brought, came into his office, that said Helms might consult him as an attorney whether the account was not barred by the statute of limitation, and that he advised the said Helms that it was, and that he then refused to pay it." This was all the testimony introduced by the defendant.

The counsel for the defendant below asked the court to charge the jury:

"That the testimony of Henry Carter is not sufficient of itself to remove the bar of the statute of limitation;" which was refused by the court.

This refusal to charge is assigned for error.

John A. Nooe, for plaintiff in error:

1. The acknowledgment proved to have been made by Helms does not amount to such an unequivocal promise to pay as will remove the bar of the statute. Where the account is already barred, it is not sufficient to prove an acknowledgment of its correctness. A promise to pay, or an acknowledgment of present liability and willingness to pay, is necessary to remove the bar. St. John v. Garrow, 4 Porter, 223;

Crawford v. Childress, 1 Ala. 488; Lucas v. Thorington, 5 ib. 507; Cabaniss v. Deshler, 10 ib. 959; Lowther v. Chappell, 8 ib. 355.

As to the disinclination of our courts to have the bar of the statute removed by the subsequent promise of an executor, or administrator, see Caruthers & Kinkle v. Mardis, Adm'r. 3 Ala. 599; Hall *et al.* v. Darrington, 9 ib. 502.

2. Even if the acknowledgment or promise was sufficient to remove the bar of the statute, as to Helms, it is submitted that the promise was not binding upon his executors, who were made parties, before issue joined, as the executors of Walker.

WILLIAM COOPER, *contra:*

1. The language of Helms was both an acknowledgment and a promise to pay. It was certainly a strong negative pregnant, meaning, "although I cannot pay before January, *yet I will pay then*, as I shall then be in funds from proceeds of negro hire." If he did not intend to pay it, why acknowledge its correctness? Why refer to a particular time, and to a particular fund, unless he intended to pay at that time? The language here was stronger, than that used in any of the cases which are relied on by the plaintiffs in error, and does not conflict with them in the slightest degree.

2. A promise made by a sole executor or administrator, is sufficient to remove the bar of the statute, and revive the cause of action. Hall, Weeks & Co. v. Darrington, 9 Ala. 502.

PHELAN, J.—Two questions present themselves in this case for our decision; 1. Could Helms, as executor of Walker at the time he used the words to the witness Carter, on being presented with the account, bind the estate of his testator? 2. Will these words, rightly interpreted, have that effect.

On the first point, we think it clear that he could bind the estate. He was the sole executor, and as such had the power to bind the estate by his admissions, as has been decided in the case of Hall, Weeks & Co. v. Darrington, 9 Ala. 502. If his admission was binding, then it gave to the plaintiff rights,

which could not be changed or impaired by the fact that Helms subsequently died, and his executors, after suit brought, became parties to the suit as the representatives of Walker, through him.

2. Will the words of Helms, used to Carter, when presented with the account against Walker, rightly interpreted, have the effect of removing the bar of the statute of limitation? These words are, "The account is a good one, but I cannot pay it before January, at which time I will be receiving money for the hire of negroes." It has been held in numerous decisions of late years, that where the bar of the statute was complete, as in this case, a mere admission of the *correctness* of the account would not remove the bar of the statute, and that to produce this effect, there must be not only an admission of the *correctness* of the demand, but also a *willingness* to pay it. See case of Lowther *et al.* v. Chapell, 8 Ala. 352, and authorities there cited by Mr. Justice Goldthwaite; See also, Crawford *et al.* v. Childress, Ex'rs, 1 Ala. 483; 2 Greenleaf Ev. § 440, and authorities cited. We are disposed to maintain the same doctrine, now that the question is directly made.

The only thing next to determine is, the true force and meaning of the words used by the executor Helms. The defendant below had a right to call upon the court to decide their legal import. This was not calling upon the court to usurp the province of the jury, as the counsel for defendant in error has argued, It was in the nature of a demurrer to evidence. Sims v. Sims, 2 Ala. 117. The request of the counsel for defendant to the court to instruct the jury, that these words were not sufficient in themselves to remove the bar of the statute of limitations, we think, was properly refused, for the reason that these words, when rightly interpreted, contain not only an acknowledgment of the *correctness* of the account, but a *willingness* to pay it. To the first point, the admission that the "*account*" was "*a good one*," is too plain to admit of construction; and the remainder of the words, "I cannot pay it before January," means, *I will pay or try to pay it after January;* and to strengthen this inference, natural in itself, he immediately makes reference to the means out of which he expected to be able to pay; "*at which time I will*

be receiving money for the hire of negroes"—the negroes of the estate of his testator, as it is to be presumed.

The admission amounted to an acknowledgment of the *correctness* of the debt, and also of a *willingness* to pay, and this was sufficient, when made by a sole executor, to take the case out of the statute of limitations. The request of the defendant below, for a charge to the contrary, was properly refused,

Let the judgment below be affirmed.

DAVIS *vs.* YOUNG.

1. To maintain trespass, the plaintiff must show in himself either actual possession or the immediate right of possession at the time of the tortious taking.
2. If the owner has neither the actual possession, nor the immediate right of possession at the time of the tortious taking, his remedy is case or trover.
3. If the original taking was not a trespass as against the plaintiff, the subsequent conversion of the property by the defendant will not make him a trespasser *ab initio.*
4. When justification and the general issue are pleaded to an action of trespass, the plaintiff must show his actual possession, or immediate right of possession.

ERROR to the Circuit Court of Pickens.

Tried before the Hon. William R. Smith.

BLISS and PECK for plaintiff in error.

P. & J. L. MARTIN, *contra.*

DARGAN, C. J.—We will not examine the questions in the order in which they have been presented in the argument at the bar, but will take up the last question first, and that is, will trespass lie upon the facts disclosed by the bill of exceptions? The plaintiff, to show title to the cotton, for the taking of which this action was brought, introduced a deed of trust, bearing date the 10th day of October, A. D. 1844, by which Adelaide Kidd conveyed to the plaintiff, Joshua Young, a number of slaves, horses and mules, with other stock and farming utensils, together with her crop of cotton, then being gathered, for the purpose of securing certain debts therein specified. The deed provided that Adelaide Kidd, the grant-

or, should retain possession of the property until the first day of January, 1845, and further, that if she should make default in the payment of the debts thereby secured, then the plaintiff should sell the property in the mode pointed out, for cash, and from the proceeds pay the debts, &c. It appeared that the cotton was stored at a ware house in Pickens County by Mrs. Kidd, and the defendant, as sheriff, levied an attachment upon it, as her property, on the 3d day of December, 1844. This attachment was issued at the suit of Jesse H. Garrett against Adelaide Kidd, and was made returnable to the County Court of Tuscaloosa. It further appeared that the Justice of the Peace, who issued the attachment, issued an order to sell the cotton, upon an application made to him for that purpose, on the ground that it was property of a perishable nature, and in pursuance of this order the cotton was sold by the sheriff on the 1st of February, 1845, and at the time of the sale he had notice of the plaintiff's title, and the sale was forbidden by the plaintiff's agent. These are the material facts that give rise to the question, can trespass *de bonis asportatis* be maintained?

The rule of law is too well settled to be controverted, that the plaintiff must show in himself either actual possession of the goods, or the right of possession at the time of the tortious taking, and if he has neither the possession nor the right of possession, his title will avail him nothing, for the action is founded on the injury to the possession, and not on the mere title. But this right of possession must be immediate, that is, the plaintiff must show that he was entitled to the possession at the time the act was done. Mr. Chitty, in his work on Pleading, says, "If the general owner part with his possession, and his bailee have the exclusive right to use the thing at the time the injury was committed, the inference of possession is rebutted, and the right of possession being in reversion, the general owner cannot support trespass." Chitty, Pl. vol. 1, 169. In the case of Muggredge v. Evelette, 9 Met. 233, the facts were, that the plaintiff, being the owner of a schooner, by a parol agreement let or chartered her to one Gerresh, at ninety dollars per month, and Gerresh took possession of her. A few days afterwards the schooner was seized by an officer as the property of the original owner, from whom the plain-

tiff had bought her. The Supreme Court of Massachusetts, holding the parol contract of letting valid, decided that the action could not be maintained, and in the opinion this language is used, "If the plaintiff had no right to the possession, *then the taking* is not a direct injury to him, and whatever, and against whomsoever, his remedy may be, it is not to be sought in an action of trespass, grounded on his mere right of property without the right of possession." It has, however, been suggested that the case of Stanly v. Gaylord, 1 Cushing, 536, is incompatible with the case we have referred to; but without reviewing the case from 1 Cushing, I cannot perceive that there is any conflict whatever. There the bailee who mortgaged the chattel, had no authority or right to detain the chattel from the general owner, and at the time of the taking he could have asserted his right to the possession. Whether this latter case could be sustained on other grounds, it is needless to inquire; but it is clear that it gives no countenance to the idea, that the general owner may maintain trespass for a wrong done at a time when he had not the immediate right to the possession.

In the case of Lunt v. Brown, 1 Shep. 236, the facts were, that Winn, the owner of a mare, sold her to the plaintiff, but at the time of the purchase agreed to keep her until grazing time, and by the contract, Winn had the right, at a fixed price, to repurchase the mare at any time before the time arrived at which the plaintiffs were to take possession. The mare was attached a few days afterwards as the property of Winn, and the plaintiff brought trespass against the officer. The court held that the action would not lie, expressly recognizing the doctrine that trespass is a remedy for an injury to the possession, and that the plaintiff in this action must show either the actual possession or the immediate right of possession, at the time the wrongful act was done. The same doctrine is maintained in Putnam v. Wyley, 8 John. 432, and again in the case of Nash v. Masher, 19 Wendell, 431. In the latter case the facts were, that the owner of the wagon had left it in possession of a blacksmith, to have some work done upon it, and at the time of the taking the blacksmith had a lien upon the wagon, and the right to detain it, as against the owner, until the lien was paid; but he agreed

with the officer who took the wagon that he should become responsible to him for the amount of the lien, and agreed to transfer his debt to him. Trespass being brought by the owner against the officer, the question was, could the action be sustained, and after a full examination of the authorities, the court held that it could not.

I will refer to no more American authorities, but will say that I have not found one, which holds that trespass will lie by the owner of the chattel, for an injury done to it, unless at the time of the wrongful act he could have legally taken the actual possession of it. If by any contract the immediate right to the possession was exclusively in his bailee, at the time the injury was done, the owner must resort to *case or trover* to recover. Trespass is not his remedy. The English authorities, too, are in perfect harmony with the American upon this subject. In the case of Ward v. McCauly, 4 Term 480, the plaintiff had let a house to Lord Montford, ready furnished. During the lease, some articles of the leased furniture were seized under execution as the property of Lord Montford, whereupon the landlord brought trespass. The court held that the action would not lie, on the ground that the plaintiff had not the actual possession, nor the immediate right to the possession, at the time the wrongful act was done. Again, in the case of Cooper et al. v. Chitty and Blackstone, 1 Burrows, 20, the facts were, that one Johns had committed an act of bankruptcy on the 4th of December, 1753, and on the 8th of the same month a commission of bankruptcy was sued out against him, and on the same day the plaintiffs were appointed his assignees, but between the act of bankruptcy and the suing out of the commission, the goods were seized by the sheriffs of Middlesex under an execution against the bankrupt, but not sold by them until after the assignees were appointed, who had given the sheriffs notice of their title. The case was twice argued, and the opinion delivered by Lord Mansfield. The court held that the title of the plaintiffs related back to the secret act of bankruptcy, but inasmuch as they had not the right of immediate possession of the goods at the time the levy was made, trespass would not lie, and that trover was the proper remedy. This decision of Lord Mansfield has never been questioned in England, as I can discover, but on

the contrary, has been repeatedly recognized as the settled law; see 1 Term Reports, 475; Smith v. Clark, 9 Bingham, 471; 4 ib. 597; 4 M. & S. 260. These authorities convince me, that the plaintiff failed to show such a right of possession to the cotton in controversy, at the time of the original taking, as will sustain the action of trespass, and consequently that the court erred in holding the contrary.

But it has been argued that the sale of the cotton by the sheriff in February, after the plaintiff's right to the immediate possession was complete, made the sheriff a trespasser *ab initio*, and therefore the action will lie. Now, I admit that it is the settled law, that if one enter upon land, or into a house, under a license, or by authority, and he abuse the license or authority, this shall make him a trespasser from the beginning This has been the settled law ever since the case of the Six Carpenters, 8 Coke, 146. But the case at bar does not fall within that principle, for all the authorities to which we have referred hold, that if the original taking be not a trespass, as against the plaintiff, the subsequent conversion of the property will not make the defendant liable to this action. Now, let us examine the plaintiff's right of possession at the time the levy was made. By the terms of the deed, Adelaide Kidd reserved to herself the possession of the property until January, 1845. The plaintiff then, at all events, could not have the *immediate* right of possession until that time, and if in the meantime she had paid the debts intended to be secured by the deed, he never would have been entitled thereto. This was the state of the plaintiff's title on the 2d day of December, 1844, when the levy was made, and at that time the taking was no trespass upon his possession, and the subsequent sale cannot render it so.

It has, however, been urged that this question does not arise under the special plea of justification; but it is enough to say that it arises under the general issue which is pleaded, for under that issue it would not be contended that the plaintiff would be relieved from showing his immediate right to possession; indeed, that is the very evidence of his right to this action. It is not, therefore, necessary to examine whether the plea of justification is an admission of the right of possession in the plaintiff.

As this question is conclusive of the action in its present form, we deem it unnecessary to look into the other questions growing out of the record. Should the cause ever be tried again, they may all be avoided, or if not, it will then be time enough to decide them. In conclusion, we will add, that though it is always more agreeable to the court to decide on the merits of a case, than to turn the plaintiff out upon the mere form of the remedy; yet the law governing the remedy is as conclusive on the court, as the law governing the mere right.

Let the judgment be reversed, and the cause not remanded.

ANDERSON *vs.* KNOX.

1. In an action upon a covenant of seizin, the breach may be as general as the covenant.
2. A covenant of seizin is broken as soon as made, if the covenantor had no title to the estate granted.
3. An unqualified covenant against incumbrances is broken by the existence, at the time of its execution, of an outstanding incumbrance; but if the covenant merely extends to quiet enjoyment against incumbrances, then it is broken only by an entry, or expulsion from the premises, or some disturbance in the possession.
4. In an action on a covenant of seizin, or against incumbrances, if the plaintiff has bought in an outstanding title or incumbrance, he is entitled to recover the reasonable price which he has fairly and necessarily paid for it.
5. But the amount paid by the plaintiff for such outstanding title or incumbrance is no evidence of its value, in the absence of all other evidence.
6. The fact that the plaintiff offered to prove the reasonableness and fairness of the price paid by him for the outstanding incumbrance, and was prevented by an objection on the part of the defendant, which was sustained by the Court, does not justify the jury in acting without proof, or in considering that as proof which would otherwise be incompetent.

ERROR to the Circuit Court of Montgomery.
Tried before the Hon. George Goldthwaite.

This was an action of covenant brought by Knox against Anderson. The declaration avers the sale and conveyance by Anderson to Knox of certain land therein described, and

that by the said deed of conveyance said Anderson covenanted as follows, namely: "that he (Anderson) was lawfully seized in fee of the afore granted premises; that they were free from incumbrance, and that he had a good right to sell and convey the same to the said William Knox, his heirs and assigns."

The breach assigned is, "that said Anderson was not at the date of said deed seized in fee of said premises, and that the same was not free of incumbrance, but the plaintiff avers that a portion of the land, which is particularly described, was granted by the Government of the United States on the 30th November, 1827, to Jonathan Mayhew, and by him conveyed, on the 30th May, 1830, to Lucy Mayhew, and on the 20th September, 1831, by Lucy conveyed to George Whitman, and Harriet Whitman his wife, to hold to them and the survivor of them, and to their children, after the death of the survivor of them, then living, and in default of children then living, to the heirs of the survivor. That in said deed from Lucy Mayhew to George and Harriet P. Whitman, said Lucy covenanted that the said grantees might, by writing under their hands and seals, made in the presence of two witnesses, revoke the limitations contained in said bargain and sale to the said George and Harriet, and such other appoint as they might deem fit. That Anderson claims to have derived his title to the premises by intermediate conveyances through said George and Harriet, who are still living, and also have children living. That at the date of the conveyance by said Anderson to Knox, said Harriet had never in any manner bargained, sold or conveyed her interest in said land to said Anderson, according to the power contained in the deed from Lucy Mayhew, nor to any other person whatever; that the limitations in said deed were not revoked, but were still outstanding and in full force at the date of said Anderson's conveyance to Knox, and so remained until December, 1849, when, in consideration of seven hundred and fifty dollars paid to said George and Harriet, his wife, by said Knox, they conveyed said premises to him according to the form prescribed in the deed of Lucy Mayhew, and thus revoked and extinguished the limitations by said deed to them created, subject to their revocation in the manner therein prescribed."

To the declaration, the substance of which is above stated, the counsel for Anderson demurred, which demurrer was overruled.

A bill of exceptions was sealed upon the trial, from which it appears, the facts stated in the declaration as to the several conveyances were proved, and that Knox had paid to Whitman and his wife, Harriet, the amount stated in the declaration, in order to purchase in the interest of Mrs. Whitman, and to cut off the remainders limited by the deed of Lucy Mayhew.

There was no evidence of the value of the interest or claim of Harriet Whitman under the deed of Lucy Mayhew, except that the plaintiff had paid seven hundred and fifty dollars to her to join in a conveyance, as above stated, with her husband. The plaintiff (Knox) offered to prove that this sum was a reasonable equivalent for the outstanding title so purchased, to which the defendant (Anderson) by his counsel objected, and the court sustained the objection.

Upon this state of facts, the court charged the jury, that if they believed from the evidence that, at the time of the execution of the deed by George and Harriet Whitman, Harriet Whitman was alive, then there was a breach in the covenants contained in the deed from the defendant to the plaintiff; and that if the plaintiff had purchased the interest or claim of Harriet Whitman, he was entitled to recover of the defendant the value of that interest or claim, and that in the absence of any other evidence as to its value, they might take the amount paid by the plaintiff for the purchase as evidence of such value.

The defendant asked the court to charge the jury, that if George Whitman had conveyed the land after the execution of the deed from Lucy Mayhew, and after the 20th December, 1849, and that George and Harriet were both alive, then the plaintiff could only recover nominal damages; which the court refused to give. A judgment was rendered for the plaintiff below upon the verdict in his favor, and the defendant brings the case to this court, and assigns for error:

1. The overruling the demurrer to the declaration.
2. The court erred in the charge given.
3. In refusing the instruction prayed.

N. HARRIS, for the plaintiff in error.

1. The declaration is bad, because it does not show an outstanding title which can be enforced against Knox, the defendant in error, and an assertion of that title, and an ouster or disturbance by means of it.—Loomis v. Bidell, 11 New Ham. 82; Day v. Chism, 10 Wheat. R. 449; 2 Chit. Pl. 545, top; 1 U. S. Dig, 686, § 298, 299; Smith v. Shepherd, 15 Pick. R. 149; Clarke v. McAnulty, 3 Serg. & Rawle, 364; Platt on Cov. top page, 147; 3 Black. Com. 184; Downing v. Baldwin, 1 Serg. & Rawle, 298.

2. The deed made by Whitman to Bunkley estops both Whitman and Mrs. Harriet Whitman during their joint lives, from asserting any title to the property. Mrs. Whitman could only sue during the lifetime of Whitman, by joining her husband, and he is estopped by his deed.—Wralten Read v. Barkerville, 2 Howard's U. S. 359.

3. The amount paid by Knox is no evidence of the value of the title alleged to be outstanding.—Massy v. Cram, 1 McCord, 689; Bond v. Quattlebum, ib. 584.

4. The charge given by the court is not the law, as is shown by the authorities cited to sustain the demurrer.

5. Even if the contingent interest of Mrs. Whitman can be deemed an outstanding title or an incumbrance, she not being capable of enforcing it at the time of the purchase of her interest by Knox, she can only recover nominal damages.—Massey v. Cram, 1 McCord R. 689; Bond v. Quattlebum, ib. 584.

MARTIN & BALDWIN, *contra.*

In an action on a covenant of seisin, the breach may be as general as the covenant. 2 Chitty, 547, note (i); 3 Saunders' R. 182, note (b. c.); Abbot v. Allen, 14 John. R. 251; Sedgwick on Dam. 181; Nickers v. Snyder, 9 Wend. 416.

A vendee of land with a warranty of title may purchase an outstanding paramount title, and recover upon his warranty without an actual eviction. Davenport v. Bartlet, 9 Ala. Rep. 179; Dupuy v. Roebuck, 7 Ala. Rep. 488.

An action for a breach of covenant of seizin may be maintained, though the plaintiff has never been evicted. Abbott v. Allen, 14 John Rep. 251; Prescott v. Trueman, 4 Mass. 627.

A grantor who gives a covenant of seizin is not bound to deliver to his grantee the evidences of his title. The grantee relies on his covenants, and until the grantor discloses his title, the grantee holds the negative, and is not bound to aver or prove any fact in reference to an outstanding title. Abbott v. Allen, 14 John. R. 253.

In an action on a breach of covenant of seisin, the measure of damages is the difference in value of the estate conveyed and that taken under the deed. 12 John. R. 126.

If a grantee has extinguished an outstanding title, he will be entitled in damages to a fair price, which he was necessarily compelled to give for it. 16 John. Rep. 127; Prescott v. Trueman, 4 Mass. 627; Delavergne v. Norris, 7 John. 358; Sedgwick on Meas. of Damages.

The defendant below cannot complain that specific proof of the value of the outstanding title was not given, when the offer to make this proof was excluded on the motion of the party himself that now raises the objection.

CHILTON, J.—We are of opinion that the court properly overruled the demurrer to the declaration. It seems to be well settled, that in an action upon a covenant of seizin, the breach may be as general as the covenant. See Sedgwick on Damages, 181, and cases there cited. In this case, the pleader has averred the existence of an outstanding title or incumbrance, showing in what it consists, and also that the plaintiff below purchased it, in order to perfect his title, at the price of seven hundred and fifty dollars. In order to pass the title conveyed by Lucy Mayhew to George Whitman and his wife, it was necessary that they should have conformed to the mode prescribed by the power contained in the deed to them. This they failed to do, and notwithstanding the execution of the deed from Whitman to Bunckley, under whom Anderson claimed, the power to appoint other limitations, inconsistent with the absolute title attempted to be conveyed by Anderson to Knox, still existed, and this of itself constituted an incumbrance upon Knox's title, amounting to a breach of Anderson's covenant, and justifying Knox in purchasing its extinguishment by a revocation of the limitations created by Lucy Mayhew's deed, and in procuring an appointment to himself of the fee.

2. It is well settled, by numerous authorities, that a covenant of seisin is broken as soon as made, if the covenantor had no title to the estate granted. See 2 Bacon's Abr. by Bouvier, tit. Covenant, p. 595, and cases there cited.

3. So, also, an unqualified covenant against incumbrances is broken by the existence, at the time of its execution, of an outstanding incumbrance. Ib.; Wyman v. Ballard, 12 Mass. Rep. 304; 17 ib. 220; Andrews v. McCoy, 8 Ala. Rep. 920. If, however, the covenant merely extends to quiet enjoyment against incumbrances, then it is broken only by an entry, or expulsion from the premises, or some disturbance in the possession, 2 Bacon, 595, *supra.*

4. As Knox was not bound to wait until after he was disturbed in his possession, in order to entitle him to his action for a breach either of the covenant of seizin or against incumbrances, he would be entitled, at least, to nominal damage; but if he has proceeded to purchase in the outstanding title or incumbrance, as he well may do, then he is entitled to recover the reasonable price which he has fairly and necessarily paid for the same. He can recover no more than the price paid, with interest from the time of payment, but may recover less, as the proof may satisfy the jury that the title or incumbrance was not worth the amount paid, or could have been procured for less. Harlun v. Thomas, 15 Pickering, 69; Mitchell v. Hazen, 4 Mass. 412; and cases on the brief of defendant's counsel. See also Dunn v. White & McCurdy, 1 Ala. Rep. 645.

5. But in charging the jury, that in the absence of any other evidence, of the value of the outstanding incumbrance, they might take the amount paid by the plaintiff (Knox) as evidence of such value, the Circuit Court mistook the law. It was incumbent on him to prove, in order to recover more than nominal damages, not only the amount paid, but that such payment was the reasonable value of the interest acquired. To hold that it was reasonable, from the bare fact of payment, is to assume as true the fact to be proved.

The payment was an act done, in which Knox and Whitman were alone the actors. Anderson was neither a party, nor privy to it, and, as to him, it was clearly *res inter alios acta*, and, according to the established rules of evidence, in-

admissible to fix the amount with which he should be charged, but allowable only as a fact, which, if connected with proof of its fairness, would entitle the plaintiff below to recover the sum so paid.

That Knox offered to prove the reasonableness of the payment, and was prevented by an objection interposed by the other side, which the court sustained, did not justify the jury in acting without proof, or in considering that as proof which would otherwise be incompetent. This part of the charge, therefore, was erroneous.

The views above expressed show that the court properly refused the charged prayed for by the counsel for the defendant in the court below.

Let the judgment be reversed, and cause remanded.

MAHAN *vs.* LESTER.

1. Before the passage of the act of 1850, (pamphlet Acts 81,) in cases of forcible entry and detainer, unlawful detainer, &c., removed into the Circuit Court by *certiorari*, a trial must have been had on an assignment of errors on the record sent up by the justice of the peace, and not *de novo;* and if the party whose duty it was to assign errors, failed or refused to do so, the judgment of the justice must have been affirmed.
2. The act of 1850, which requires a trial *de novo* to be had in such cases, does not apply to cases which had been removed to the Circuit Court, and which were there pending at the passage of the act.
3. Where the petition for a *certiorari* had been presented to the Circuit Judge, and his fiat obtained, and these had been filed with the clerk of the Circuit Court before the passage of the act, the jurisdiction of that court attached, and the act of 1850 cannot apply to the case, although the bond required by the judge was executed, and the writ of *certiorari* issued, after the passage of the act.
4. When a trial *de novo* is improperly had in the Circuit Court, in a cause which was there pending before the passage of the act of 1850, the judgment founded upon the verdict of the jury will be reversed in the Appellate Court, although the plaintiff in error is the party who sued out the *certiorari*, and who failed to assign errors in the Circuit Court.

ERROR to the Circuit Court of Tallapoosa.

Tried before the Hon. E. Pickens.

Lester commenced a proceeding, under the statute, against Mahan, before a justice of the peace, for the unlawful detainer of the possession of certain lands described in the proceedings; the jury, trying the case before the justice, rendered a verdict against the defendant, and judgment was given accordingly. On the 5th of February, 1850, the defendant exhibited his petition, for *certiorari*, to the Judge of the Ninth Judicial Circuit, who, by his *fiat* without date, ordered the *certiorari* to issue. This petition and fiat appears, by the memorandum of the Clerk of the Circuit Court, to have been filed in his office on the 9th day of February, 1850, the bond required by the fiat to be given was executed on the 23d February, 1850, and the writ of *certiorari* was issued on the same day. When the case was called for trial in the Circuit Court, at the Fall Term, 1850, Lester moved to dismiss the case for want of an assignment of errors by the party suing out the writ of *certiorari*, but the court overruled the motion, and directed the cause to be tried *de novo*, notwithstanding the objection of Lester's counsel.

The parties then, under the order of the court, proceeded to try the case *de novo*, when Mahan took several exceptions to the ruling of the court, as shown by a bill of exceptions in the record. The jury returned a verdict for Lester, the plaintiff, (as the case stood on the docket,) and a judgment was given against him for costs, but it appearing that he had previously surrendered the possession, no writ of restitution was ordered.

The case is brought to this court by writ of error, sued out by Mahan, and he assigns for error the matters set forth in the bill of exceptions, and in the record of the Circuit Court.

L. E. Parsons, for plaintiff in error.

Falkner & Rice, *contra.*

LIGON, J.—The rules regulating proceedings in the Circuit Court, in cases of forcible entry and detainer, brought before it by *certiorari*, have demanded the attention of this court from a very early period, and are scattered through many of its decisions, so that, under the law as it had been settled, before the passage of the act of 12th February, 1850,

the courts could experience but little difficulty with regard to them.

As early as 1822, it was held, that the trial in the Circuit Court must be on the record sent up by the Justice of the Peace, and not *de novo* before a jury. Ala. Rep. 99. At the January Term, 1830, the court advanced one step further in settling the practice, and in Durham v. Carter & Carroll, 2 Stew. 497, it was held, that the trial must be on errors assigned in the record. In Aldridge v. Hightower, 4 Por. 418, still further progress was made, and it was held, that, if the party removing the cause to the Circuit Court by *certiorari*, failed to assign errors, the judgment of the Justice should be affirmed. This rule is again laid down in Bell v. Killcrease, 11 Ala. Rep. 685, and may now be regarded as the settled rule for the government and disposal of all cases of this class, which are not within the influence of the provisions of the act of 12th February, 1850, above referred to.

It is perfectly clear, that if the new rule established by the act of 1850 does not apply to this case, the court below committed a fatal mistake, in refusing to require Mahan to assign errors, as requested by the counsel of Lester, and in not entering a judgment of affirmance on his failure to do so.

The Circuit Court, however, decided that the cause must be tried under the act of 1850, and although the record shows that Lester, by his counsel, objected to this ruling, yet it appears that instead of suffering his suit to be dismissed by the court for his refusal to proceed in it, as he might safely have done, he entered into the trial *de novo*, and succeeded in obtaining a verdict and judgment.

During the progress of the trial *de novo* in the Circuit Court, the defendant excepted to the ruling of the court on several points shown in the bill of exceptions, but as that proceeding was, in our opinion, wholly unauthorized and irregular, and the judgment in it essentially different from the one which the law would pronounce, we deem it unnecessary to examine the rulings of the court with regard to the testimony.

The act of 1850 (session acts 81) could not, from the nature of the provisions contained in it, have been intended by the General Assembly to apply to any case which had been de-

cided by a Justice of the Peace, and brought into the Circuit Court by *certiorari*, before its passage. The first section of the act provides, that after its passage, "all cases of forcible entry and detainer, forcible detainer, and unlawful detainer, which may be removed to any Circuit or *County* Court pursuant to law, shall be tried *de novo*," &c. The second section provides, "that any person agrieved by the judgment of any Justice of the Peace, or the verdict of a jury trying such cause, shall have the right of appeal to the next Circuit or *County* Court sitting for the county in which such cause may have been pending," &c. In the third section this language is employed: "That in every such case hereafter to be tried, it shall not be the duty of the Justice to make out a complete record of the proceedings," &c.

When these several provisions are taken together, they seem to exclude the idea that they were intended to be applied to any causes except such as are tried before the Justice, according to them. Before the passage of this act, the Justice was required to make a record of the proceedings before him, and of so much of the evidence as was objected to; no appeal was allowed, and the *County* Court had no jurisdiction whatever, (Clay's Dig. 253, § 18; 2 Stew. 496); but in the cases intended to be included in this act, that Court has concurrent jurisdiction with the Circuit Court. Doubtless the Legislature intended to provide a rule for such cases as might arise, or find their way into the Circuit and County Courts after its passage, and not to regulate the manner of proceeding in those already pending in the Circuit Court.

But it is insisted that this cause cannot be regarded as having been pending in the Circuit Court at the passage of the act of 1850, and consequently was rightly subjected to its provisions in the form and manner of trial. This is predicated on the supposition, that although the petition was presented to the Circuit Court Judge, and his *fiat* obtained for the *certiorari*, and both the petition and *fiat* were filed with the clerk before the passage of the act, yet the bond was not executed, nor the writ of *certiorari* issued, until ten days after its passage, and that, until the *bond* was given, the case was not in the Circuit Court.

It may be replied, that the bond, on the execution of which

so much stress is placed in the objection, is not required by the statute, and consequently its execution is neither indispensable nor necessary to give the Circuit Court jurisdiction. Whether a bond shall be given or not, is left to the discretion of the Judge granting the *fiat* for the writ of *certiorari*. Clay's Dig. 251, § 18; Childress v. McGehee, Ala. Rep. 131.

But in this case, other considerations show conclusively that the jurisdiction of the Circuit Court had attached before the passage of the act. The petition had been presented to the Judge, his *fiat* obtained, and these filed with the Clerk of the Circuit Court, before the approval of the law. These are the incipient steps necessary, in cases of this kind, to call the jurisdiction of that court into action; it attached the moment the *fiat* was granted by the judge, and was rendered complete and active by the execution of the bond, and issue of the writ of *certiorari* and notice; the former to bring up the record, and the latter to bring in the opposite party. These relate back to the petition and *fiat*, and thus fix the period at which the suit may be said to have been pending in the Circuit Court, at the point of time when the first legally authorized steps were taken to bring up the record, or in other words, when the petition was presented and the *fiat* of the Judge obtained.

The act of 1850 is not the law regulating the proceedings of this case, and so far as any were had under it, they were wholly irregular, and cannot be allowed to effect detrimentally the rights of the parties. The unwilling acquiescence of Lester in the trial *de novo*, will not render it regular, and consequently the judgment rendered in it, founded, as it appears by the record to be, on the *verdict of the jury*, cannot be supported. The only judgment which the court could have rightfully rendered, must have been founded alone on the record sent up by the Justice of the Peace, and could have been none other than one of affirmance or reversal, on errors assigned.

In the court below, the plaintiff moved to dismiss the case for the want of an assignment of errors, which was refused, and as it appears by the record, the court, without any further action of either party, but *mero motu*, directed a jury to come, and a trial *de novo* to be had. The motion to dismiss

was rightly refused. The judgment of the court, in case the party bringing the cause into it refused or failed to assign errors, should not have been one of *dismissal*, but of *affirmance* for the want of assignment of errors. 11 Ala. Rep. 685. The case, then, stands as though no order had been taken in it in the Circuit Court, except the judgment, which is irregular and erroneous, and it must be remanded to that court, that it may be proceeded in according to the law as it is declared in this opinion.

Let the judgment be reversed, and the cause remanded.

WARD *vs.* WINSTON & Co

1. In assumpsit by plaintiff against his commission merchants, to recover damages for losses on cotton, plaintiff introduced proof of a conversation between himself and defendants, for the purpose of showing that he had instructed them to sell his cotton and not to hold it. *Held*,

   That the fact of instructions must be determined from the whole conversation, as brought out on direct examination and cross examination; and that the court properly refused to instruct the jury upon the effect of a particular portion of it only.

ERROR to the Circuit Court of Sumter.
Tried before the Hon. Wm. R. Smith.

This was an action of assumpsit, brought by the plaintiff in error, against the defendants, who were his commission merchants, to recover damages for their alleged neglect and mismanagement in the sale of his cotton. Plaintiff proved, that after defendants had received his cotton, he told them that he wanted it sold, and not held, as he had previously suffered from having his cotton held. The witness who testified to this conversation also testified, on cross examination, that when plaintiff gave these instructions to defendants, defendants informed him that, in consequence of a pressure in the money market, at that time, his cotton would not sell for more than 6¾ cents, although it was worth 7 cents; to which plaintiff replied that he would like to have seven cents. The cotton was held until May 1, and then sold for 5¼ cents.

The plaintiff requested the court to charge the jury, that if they believed he had told defendants that he wanted his cotton sold, and not held, as he had previously suffered much from having his cotton held, that this amounted to instructions to sell. The court refused the charge, and instructed the jury, that he would leave it to them to interpret the whole conversation, as brought out by the direct and cross examination. There was a verdict for the defendants. The charge refused and the charge given, are now assigned for error.

R. H. SMITH, for plaintiff in error.
BLISS & BALDWIN, for defendants.

GOLDTHWAITE, J.—It is apparent, from an examination of the bill of exceptions in this case, that the question before the jury was simply to ascertain, from the conversation proved to have taken place between the parties, whether it was the intention of the plaintiff in error to instruct the defendants, his factors, to sell. To ascertain this, they were to consider the whole conversation; and the court committed no error in refusing to charge upon the effect of a particular portion only. The charge given was equivalent to instructions, that in ascertaining the fact which the conversation was introduced to prove, they should look to the whole conversation.

There is no error in the record, and the judgment is affirmed.

MORRIS *vs.* MORRIS.

1. A bill for a divorce is not demurrable, because it alleges two distinct grounds of divorce.
2. When a bill alleges that the husband *drove his wife out of his house*, and that he lives in adultery with another woman, the case is within the statute, and is equivalent to an allegation that he "*abandoned her*," &c.
3. In applications for divorce, when the answer admits the marriage, proof that the parties had lived together as man and wife for more than forty years, is sufficient evidence of the marriage.

ERROR to the Chancery Court of Morgan.
Tried before the Hon. D. G. Ligon.

This was a bill for divorce and alimony by the wife against the husband.

The bill charges, that the parties were married in 1801, and lived together as man and wife, in North Carolina and this State, until some time in 1842: that in that year the husband drove his wife, the complainant, from his house, by fear and threats; and that about this time he commenced an adulterous connection with another woman, one Martha Jones, by whom he was reputed to have three bastard children at the time of filing the bill.

The bill also alleges that the conduct of the husband towards her was "cruel and unhusbandlike," but does not specify any acts of corporal harm. It is also alleged, that he made no provision for her support, but left her to find a support in old age, as best she could. The bill also alleges that the husband had already received from the estate of the wife's father, a certain sum of money, and that there was other money coming to her from that quarter, which she prayed he might be enjoined from receiving. The pecuniary means of the husband are set out, and the bill concludes with a prayer for divorce from the bonds of matrimony, and for alimony.

The answer denies all the material allegations of the bill, except the fact of marriage. There is a demurrer to the bill, for multifariousness, and for want of certain and sufficient allegations; which was overruled.

The chancellor, at the hearing, upon the bill, answer, and proofs, decreed in favor of the complainant, dissolving the marriage, and granting to the wife an allowance out of the husband's property.

The assignments of error amount to but three, in substance,

1. That the bill is multifarious. 2. That the allegations are not certain and sufficient. 3. That the proofs did not authorize the decree.

THOMAS M. PETERS, for plaintiff in error.

1. Defendant's demurrer should have been sustained. In

this State, divorces *a vinculo* shall only be granted in "cases" provided for by law. Some one, or all these "cases" should be alleged in the bill, either in the language of the statute, or in language of equivalent import, and at the same time specifying the facts which constitute the "case," or grounds for divorce relied on; otherwise, the bill is without equity, and demurrable. Const. of Ala. Art. 6, § 13; Clay's Dig. 169, 170, § 1, 2, 3; 10 Ala. Rep. 527; 4 Port, 467–476; 8 N. H. 160.

2. The bill is multifarious, because no one separate statutory "case" for divorce is stated in it, but parts of several are indiscriminately mingled together, so that it does not appear, with reasonable certainty, upon what grounds relief is sought; whether for "abandonment," "adultery," or "cruelty." This is not allowable. 11 Paige, 166; 4 Paige, 92; 1 Edw. 14; Story Eq. Pl. 295, § 271.

3. And though it may be admitted, that a party may join in the same bill, several distinct "cases" for divorce, without rendering it multifarious, yet each "case," or ground, or the facts constituting it, should be separately and distinctly alleged; and *parts* of *different* "cases," or grounds, should not be confusedly joined, as is done here. 4 Mass. 430; 7 Ired. 674; Story Eq. Pl. 268, § 241. *et seq.*; 4 Port. 467; 8 N. H. 160.

4. And if the allegations are sufficient, they are not sustained by the evidence. In such cases, "the confessions," or admissions, of *neither* party are to be taken or received as evidence; they are *totally* excluded, by legislative enactment. And though they might authorize the court to proceed upon evidence and proofs much less stringent than might be otherwise required, yet, where there is nothing else, the proof must fail if it rests upon these. And without the defendant's confessions or admissions, it does not appear that the *marriage* was proved, or that the complainant was an *inhabitant* of this State for *three years immediately* before filing her bill, or that her husband ever abandoned her, and lived in adultery with another woman, or that he ever treated her with cruelty. The decree is therefore against evidence. Clay's Dig. 171, § 17 and 18; 1 Mass. 241; 4 Greenl. R. 100; 4 Port, 467; 1

John. Ch. R. 197; 3 Edw. 550; 2 John. Ch. R. 204; Wright, 632; 2 Mass. 154.

5. The wife should not separate from the husband, against his consent, for a less provocation than would be sufficient cause for a divorce: if she does, it is her own fault, and she cannot be heard to complain of the consequences. If *cruelty* is relied upon, it must appear that there was *actual* violence committed, attended with danger to life or health, or there must be reasonable apprehension of such violence. Mere threats, nor alienation of feelings, nor mere indignities, or a charge of infidelity by the husband against the wife; nor vulgar, obscene, and harsh language, with epithets suited deeply to wound the feelings and excite the passions, if unaccompanied with acts or menaces of violence; nor mere austerity of temper, petulance of manner, rudeness of language, a want of civil attention, occasional sallies of passion, if they do not threaten bodily harm, or even *blows* inflicted, in a sudden passion, not often repeated, or dangerous; nor corporal maltreatment, unless the husband endangers the wife's life, will entitle her to a divorce on account of *cruelty*. 11 Ala. Rep. 620; 1 Hagg. 35; 2 Mass. 150; 1 Brayt. 55; 10 Missouri Rep. 296; 17 Conn. Rep. 189; 2 J. J. Marsh, 322; 1 Edw. 278; 2 Paige, 501; 3 Edw. 469; 15 Ala. Rep. 779; 17 Ala. Rep. 250; Shelford on Mar. & D. 425, *et seq.*; 3 Met. 257; 5 Ired. 674.

D. C. HUMPHREYS, *contra.*

PHELAN, J.—The first point made is, that the bill is multifarious. We do not consider it liable to this objection. There is but one ground for divorce distinctly and fully stated, and that is, the ground of *desertion and adultery*. What is said about her being treated by the defendant in a "cruel and unhusbandlike manner," is not accompanied by any statement of particulars; is not in the form of a distinct complaint, nor is any proof brought to that particular allegation. But even if two distinct grounds for divorce are contained in the same bill, it is not demurrable on that account.

We come next to consider whether the allegations of this bill bring the case within the scope of our statute on the sub-

ject of divorces. The statute enumerates, as one of the cases in which a divorce may be granted, "when the husband shall have abandoned the wife, and lives in adultery with another woman." The allegation here is, that he *forced her* to *abandon him; drove her off* is the language of the bill. And this, it is insisted, does not bring the case within the statute. Then, if a man will only be guilty of the aggravated wrong of bringing an adulteress into his house and driving his own wife out, the statute will afford the injured wife no relief. It would be monstrous to give it such a construction, and we, therefore, hold the allegations sufficient.

But it is contended, in the last place, that the proofs do not justify the decree. We have examined them carefully, and we cannot hesitate to say that they make out a very gross and disgusting case of adultery on the part of an old man, who drives from the house the wife with whom he had lived for more than forty years, and by whom he had sons and daughters then grown.

It is also objected, that the fact of the marriage of the parties is not proved, except by the admissions of the answer, which it is insisted are not competent for this purpose. We express no opinion on this point; it is not necessary, for the fact that the parties lived together for many years as man and wife, is abundantly proved by the witnesses on both sides, and that is sufficient proof of marriage in this case.

Let the decree of the Chancellor be affirmed.

WORTHY, BROWN & Co. *vs.* PATTERSON.

1. Proof that a witness, who had been supœnaed, and whose deposition had been taken twelve days before the trial, was infirm and generally unable to leave home about the time when his deposition was taken, raises a *prima facie* presumption that he was unable to attend court, and, in the absence of proof to to the contrary, showing his ability to attend, warrants the admission of his deposition.
2. The measure of damages for the false warranty of the soundness of a slave, when the purchaser has not offered to return him, is the difference between his actual value and the amount which he would have been worth if sound.

ERROR to the Circuit Court of Montgomery.

Tried before the Hon. John D. Phelan.

This action is brought to recover damages for the false warranty of a slave. It appeared that the defendants sold the slave to the plaintiff on the 17th day of March, 1846, for five hundred and fifty dollars, and warranted him to be sound. And it was proved that the slave was unsound, and died about two years after the sale, of injuries received before the plaintiff bought him. It was shown, however, that the slave rendered the plaintiff service, up to November, 1847, and that such services were worth from four to six dollars per month. The plaintiff had never offered to return the slave to the defendant. In the progress of the trial, the plaintiff offered to read the deposition of one Boswell, who had been examined upon interrogatories twelve days before the trial, and proved that the witness resided about fifty-four miles from the court house, was infirm at the time of taking his deposition, and generally about that time unable to leave home. He had been subpœnaed, but did not attend. Upon this evidence the court admitted his deposition, and the defendant excepted.

The defendant requested the court to charge the jury, that if they believed from the evidence, that the negro was unsound at the time of the sale, if there was no evidence that the plaintiff offered to return him, and the evidence showed that he was not wholly valueless, then the measure of damages would be, the difference between the actual value of the negro at the time of the sale, and the value of the negro had he been sound, with interest on that difference from the time of the sale. This charge the court refused, and instructed the jury, that if the slave died, before suit, of injuries existing at the time of the sale, the measure of damages was the entire value of the slave at the date of the sale. To the charge thus given, and the refusal to charge as requested, the defendant excepted.

HARRIS, for plaintiff.

SEMPLE, *contra.*

DARGAN, C. J.—We can perceive no reason why the

deposition of the witness should have been rejected. The proof was that he was infirm and generally unable to leave home at the time the deposition was taken, and it was taken twelve days only before the trial. The proof raised at least a *prima facie* presumption that he was unable to attend court, and in the absence of any proof to the contrary, showing the ability of the witness to attend, warranted the admission of his deposition. The length of time between the taking of his deposition and the trial was too short, to enable the court to conclude that the witness had recovered sufficiently to attend and give evidence. At all events, as the court did not draw the inference, that the witness was able to attend and give testimony, we cannot say there was error in not drawing such an inference.

The court, however, erred in refusing the charge requested, as well as in the charge given. If a slave is warranted sound, but is unsound at the time of the warranty, the purchaser, although he has not offered to return the slave, may, nevertheless, recover of his warrantor, to the extent that the slave is impaired in value, by the unsoundness existing at the time of the purchase. This rule has been so often announced by this court, that it must be considered as the settled law. See Hogan v. Thorington, 8 Porter, 420; White v. Kornegay, 10 Ala. 255; Marshall v. Gant, 15 Ala. 685.

If, therefore, the slave was of any value at the time of the purchase, this actual value must be deducted from the amount the slave would have been worth, had he not labored under disease at the time of the warranty. To hold otherwise, would be to allow the purchaser damages to a greater extent than he had suffered injury; and all courts hold, that the damages for a breach of warranty should only be commensurate with the injury.

If the slave was of no value at all, then the measure of damages would be, what his value would have been *had he been sound.* But if he was of any value, and the plaintiff saw fit to retain him, then the actual value of the slave must be deducted from the amount the slave would have been worth, if he had been sound. This rule compensates the plaintiff for his actual injury, and this is all to which he is entitled.

Let the judgment be reversed, and the cause remanded.

FORREST *vs.* COLLIER.

1. In an action on the case for maliciously suing out an attachment against the plaintiff, the defendant cannot raise the objection that the affidavit, which he made to procure the attachment, and on which the writ was issued, was insufficient to authorize the issuance of an attachment.
2. Nor is it necessary that the declaration should aver that the affidavit was in writing.
3. An averment that the attachment was sued out "wrongfully, fraudulently, and in order to oppress and injure said plaintiff," is equivalent to an averment that is was sued out "maliciously."
4. When the attachment was sued out by the defendant as agent for a third person, and the declaration alleges that he was not the agent of such third person, but acted wholly without authority from him, it is unnecessary to aver either the want of probable cause for the issuance of the attachment, or that the attachment suit is ended.
5. The defendant may show, in mitigation of damages in such case, that he was the plaintiff's security on a bond which had been given to stay execution in the suit in which the attachment was sued out, and that the plaintiff was about to remove his property from the State at the time he sued out the attachment against him.

ERROR to the Circuit Court of Tuskaloosa.

Tried before the Hon. Geo. D. Shortridge.

This was an action on the case by Collier against Forrest to recover damages for maliciously suing out seven attachments against the plaintiff. The declaration contained two counts, which are described at sufficient length in the opinion. The defendant pleaded, 1. Not guilty; 2. That at the time when said attachments were sued out, said Collier was indebted to the said several plaintiffs in attachment in the several sums therein respectively mentioned, and was about to remove his property out of the State, and thereby said plaintiffs in attachment would lose their debts, or have to sue for them in another State; 3. That said plaintiff was, at the time of suing out said attachments, justly indebted to said plaintiffs in attachments in the several sums therein respectively mentioned, and was about to remove out of the State, so that the ordinary process of law could not be served upon him. The plaintiff demurred to the second and third pleas, and his demurrer was sustained. There was a verdict and judgment for the plaintiff.

FRIERSON, for plaintiff in error.

1. The declaration shows no good cause of action, 1st. Because if being for a *mere wrongful* act at common law, it should show *special* damage by averment. McCullough v. Walton, 11 Ala. 492; 2d. That the facts sworn to did not authorize the issuance of the process. See Clay's Digest 54; Bennett v. Black, 1 Stewart 494; Leigh v. Webb, 3 Esp. Rep. 105; 3d. *Declaration* does not show the facts sworn to to have been in writing. Clay's Digest 54.

2. There is no averment of malice or want of probable cause. Randall v. Henry, 5 S. & Porter 567; 13 Ala. 490 and 501; 2 Saunders' P. and Evidence 659, and cases cited; Purcell v. McNamara, 9 East 361; Arbuckle v. Taylor, 3 Dow. 160; Johnston v. Sutton, 1 Term Rep. 545; Purton v. Honnor, 1 B. & P. 205; Turner v. Walker, 3 Gill & Johnson, Md. Rep. 377.

3. That there is no averment that the suit was ended or determined. Smith v. Shackelford, 1 Nott & McCord, S. C. Rep. 36; 2 ib. 143; 2 ib. 54; 6 Wendell N. Y. Rep. 418, 2 S. Pl. and Evidence 658, and cases cited.

4. That the plaintiff's demurrer to the defendant's second and third pleas should have been overruled. See Kirksy v. Jones, 7 Ala. 622. If this point is not good, then it must be a common law action, and the second and third points apply with full force.

5. That the plaintiff's oral testimony should not have been allowed, (see the bill of exceptions;) 2d. That the attachments should not have been made. Donnell v. Jones, 13 Ala. 490; Kennedy v. Deer, 6 Porter 90.

6. That it was improper to permit the plaintiff to read, in evidence to the jury, the several *judgments* mentioned in the bill of exceptions and their several levies, and prove the proceedings thereon. It was irrelevant to the issue. Morrison et ux v. Wright, 7 Porter 67.

9. It was improper to restrict the testimony of the defendant, as shown by the bill of exceptions. The defendant's testimony offered was proper, and should have been permitted. Kirksey v. Jones, 7 Ala. 622; Randall v. Henry, 5 Stewart & Porter, 367.

P. & J. L. MARTIN, *contra.*

CHILTON, J.—This was an action on the case by Collier against Forrest, for falsely, maliciously, and fraudulently going before a justice of the peace and suing out, as agent for a third person, an attachment against the plaintiff, when he had no authority from such person to sue out the same, and when execution on the demand was suspended by a stay-bond, said Forrest himself being the security on said bond.

There is another count, which does not differ materially in its structure, except that it sets out the facts with more particularity, and avers that seven judgments were rendered by one Childress, a justice, which are particularly described, against said Collier and his partner, Faver. Executions were issued in due time, and stayed by the execution of a bond, with Forrest as surety thereon. That before the stay had expired, said Forrest went before the justice who had issued the executions, and in order to injure and oppress the said plaintiff, &c., falsely and fraudulently represented himself to be the agent of said plaintiffs respectively, in said seven judgments; made affidavits in the several cases, as agent, for attachments, and procured the same to be issued. The count avers he was not the agent at the time spoken of, had no authority to sue out the writs, and that said attachments respectively were falsely, maliciously, and vexatiously sued out, and were levied on certain property of the plaintiff, which was detained from his possession thereby, and he put to expense in defending, &c. This is the substance of the counts. They were demurred to in the court below, and the court having overruled the demurrer, their legal sufficiency is the first matter of inquiry.

We will consider the objections as the same are presented by the counsel for the plaintiff in error.

1. He insists, that the counts being for a mere wrongful act, the plaintiff should have averred special damage. Without deciding whether such averment, in this case, is necessary, we reply that in this case special injury is alleged, viz: that by reason of the seizure, his property, of the value of $2,000, has been lost to him.

2. That the facts sworn to did not authorize an attachment. We think this is not an important inquiry in this case. Whether in strictness of law the affidavit was such as would have

supported the attachment, had a motion been made to quash the writ for that defect, we will not decide. It is sufficient that the affidavit was such as to call into exercise the jurisdiction of the justice over the case presented, and that the issue of the attachments was the immediate or proximate result of making the affidavits. The defendant below made the affidavits and *procured* the issue of the attachments thereon, and it is not to be tolerated, if he did it maliciously as well as unauthorizedly, that he should screen himself from responsibility, by showing that he induced the justice to issue them upon affidavits which were not sufficient. It is certainly true that a mistake of the justice should not be allowed to prejudice Forrest; as, if the latter had applied and made oath for an attachment, the justice had issued his warrant for some offence against the criminal law. But in this case he applies for attachments and gets them, and although they may not be regular, the injury to the defendants in the writs is not the less, nor are they less the immediate consequence of his unauthorized act; see Ewing v. Sanford, 19 Ala. Rep. 605.

3. This reasoning equally applies to the objection that the fact is not averred in the declaration that the affidavits were in writing. We repeat, that the regularity of the attachment proceedings is not before us. It is sufficient that the justice has by law jurisdiction over the subject of attachments, and that that jurisdiction was called into exercise by the malicious and unauthorized act of Forrest, as charged in the declaration.

4. It is said there is no averment of malice. The second count does aver that the act was done maliciously. The first does not use this term, but equivalent expressions, that it was done "wrongfully and fraudulently, to injure," &c.

5. The other objections, that there are no averments of the want of probable cause, or that the attachment suits have been ended, do not apply to a case like this, where the false and fraudulent representation of agency, resulting in consequent damage, is the *gist* of the action. Whether there existed cause for the attachments or not, so far as the creditors were concerned, is only important as affecting the damages, and allowable, under the peculiar circumstances of this case, as explanatory of the motive of Forrest. His peculiar relation to

the parties, standing as surety on the stay-bond, and seeing his principal about to remove his property, so as, if effected, he would most likely have the debt to pay, while these facts did not authorize his act, and consequently constitute no bar to the suit, as the pleas suppose, yet they presented the case in a different light than that which would have characterized it, had there existed no such relation, and no attempt by the principal to remove his property.

The principles above stated embrace all the points raised in this case, and show that the court did not err in sustaining the declaration, and adjudging the second and third pleas bad; but did commit an error in the exclusion of the testimony, as to the intention of the defendant in error to remove and take his property to Louisiana. We repeat, that while this proof would not bar the action, it explains, to some extent, and is proper to be considered in determining whether Forrest acted wantonly.

Judgment reversed and cause remanded.

HOPKINS *vs.* SCOTT.

1. A deed of trust executed by a defaulting guardian to indemnify and save harmless his securities, which recites that the grantor is indebted to his ward in an amount equal to, or greater than the value of the property conveyed by it, and authorizes the trustee to sell whenever he may think a sale most conducive to the advancement of the purposes of the trust, and to permit the grantor to retain the possession of all the property until the sale takes place, is not fraudulent on its face.
2. When the grantor retains possession of the property, conveyed by deed of trust made in good faith, consistently with the terms of the deed, his possession is not a badge of fraud; and if it be merely permissive, it is not subject to levy and sale under execution at law.
3. In detinue against the sheriff, where fraud in the execution of the deed under which the plaintiff claims is relied upon as a sole defence, and no evidence necessarily tending to raise a presumption of fraud, or to prove fraud itself, is offered on the trial, it is not error for the court to instruct the jury "that the matters in proof did not make out a case of fraud."

ERROR to the Circuit Court of Sumter.

Tried before the Hon. Wm. R. Smith.

Detinue by Scott as trustee against Hopkins, for the recovery of certain slaves and other property.

The bill of exceptions shows, that on the 29th of April, 1847, Robert G. McMahan, guardian of Turner D. Bell, a minor, found himself in arrears to his ward, and on that day made a deed to the defendant in error as trustee, for the benefit of Christopher D. Scott and the representatives of William McMahan, deceased, his securities on his guardian's bond. In this deed it is recited that the ward will not attain his majority until about three years and a half after the date of the deed; that McMahan was very much embarrassed; was in arrears to his ward in about the sum of ten thousand dollars, and was desirous to secure, indemnify, and save harmless his securities, and to provide, as far as he could, for the payment of the sum due his ward on final settlement of his guardianship; in consideration of which and of five dollars, acknowledged to be received of Lewis M. Scott, he sells and conveys to him certain lands, slaves, household furniture, and various other articles of personal property, to be held by Scott on the following trusts:

1. That if the said grantor shall fail to pay the amount that may be due to his ward when he attains the age of majority, or whenever a settlement is effected of his guardianship, or shall fail to save his sureties harmless from loss and damage, —then the trustee, on giving thirty days notice of the time, place, and terms of sale, may sell all the property conveyed, and after paying the cost of the trust, apply the residue to the amount due his ward;

2. The trustee shall have full power and authority to sell all or any of the property conveyed, for cash, on thirty days' notice, whenever he may consider it most conducive to the interest of the ward, and hold the proceeds until they can be legally applied to the amount due the ward, or the discharge of the liability of his sureties on his guardian bond;

3. The trustee is authorized to permit R. G. McMahan to retain possession of the property conveyed until a sale becomes necessary, or most conducive to effect the object of the trust, or may hire, rent, or sell the same, or any portion thereof, and thereby increase the fund for the payment of the amount due the ward, (the value of the property being large-

ly inadequate as a security); and the proceeds of any such hiring or renting, so made by the trustee, to be held by him on the same trust as the property itself.

The plaintiff then proved the execution of the deed, and the truth of the recitals contained in it, except the amount of McMahan's indebtedness to his ward; and on this subject the proof was, that at the making of the deed, McMahan had made the best computation he could of this indebtedness, and supposed it to be $9,400, that it had since been truly ascertained, and was found to be $9,868 16-100, at that time; that the sum of $10,000 was inserted by the draftsman, without McMahan's saying or doing more than furnishing the estimate aforesaid.

The defendant then proved that on the 6th of December, 1848, he was sheriff of Sumter county; and as such, levied sundry valid executions against McMahan, Southerland & Co. (of which firm, R. G. McMahan, the grantor in the deed, was a partner) on the property in controversy, as the property of McMahan—the liens of these *fi. fas.* did not attach until after the date and registration of the deed to the plaintiff; that he possessed said property under such levy when this suit was brought. It was further proved by defendant, that McMahan and his mercantile partners were all insolvent when the deed was made, and this deed included all McMahan's individual property; and about the same time, McMahan, Southerland & Co. made a general assignment of the effects of the firm to a trustee for the benefit of the creditors of the firm; that McMahan had remained in undisturbed possession of all the property conveyed, by permission of the trustee, from the date of the deed until the levy, and was so possessed, when the levy was made. This was all the material proof in the case, except the proof of the value of the property sued for.

Under this proof, the court ruled, that the deed was not fraudulent on its face, and charged the jury:

1st. That the matter in proof did not make out a case of fraud;

2d. That under the provisions of the deed, and the facts proved, no estate was in McMahan which was subject to levy.

To this ruling and these charges of the Circuit Court the defendant excepted, and the case is brought here for revision.

R. H. SMITH, for plaintiff in error:

1. It is a principle often recognized by the Supreme Court that an insolvent debtor making an assignment, must not stipulate for any benefit to himself, but must fairly appropriate the property to his creditors. Providing for the retention of possession by the grantor, until the law day, is not fraudulent; for it is a consequence which follows, without any stipulation to that effect, and the creditors may reach any such interest. But the deed in this case does, virtually, and in the most objectionable manner, reserve an interest to the grantor, and yet keep off his creditors. The grantor empowers his appointee to confer on him a right which he cannot directly reserve. The stipulations leave no estate which a creditor can reach, (12 Ala. 673,) and yet one which the debtor may, by the permission of the trustee, enjoy for years. Permitting the grantor to enjoy in a manner inconsistent with the purposes of the trust, is evidence of fraud, 4 Ala. 374; 12 ib. 101; 10 ib. 93.

2. This case is clearly distinguishable from all the cases on which the defendant in error relies. See Abercrombie v. Bradford, 16 Ala. 560, and the other cases cited on defendant's brief.

REAVIS AND BLISS, for defendant in error:

I. The deed is not fraudulent on its face, and the evidence before the jury did not show it to be fraudulent in fact, for, 1. It is no objection to the validity of the deed, that it conveys all the grantor's property, for the indemnity of his sureties and his ward. He had the right to give this preference. See the cases cited in 1 Reavis' Dig. p. 76, § 1; also, Hindman v. Dill, 11 Ala. Rep. 689.

2. The fact, therefore, that the grantor was in failing circumstances, can not affect the validity of the deed. Hindman v. Dill, 11 Ala. Rep. 689; and the cases cited in 1 Reavis' Dig. p. 76, § 1.

3. A deed made *bona fide*, in trust, to secure a contingent liability, will be upheld against a creditor of the grantor, and while the liability is continuing, and undetermined, the property conveyed in trust, cannot be sold for the debts of the grantor. Hawkins v. May, 12 Ala. Rep. 673; Perkins v. May-

field, 5 Port. 182; Frow v. Smith, 10 Ala. Rep. 571; Dubose v. Dubose, 7 Ala. Rep. 235; Elmes v. Sutherland, ib. 262; Pope v. Wilson, ib. 690; P. & M. Bank v. Clarke, ib. 765; Tarver v. Roffe, ib. 782; Graham v. Lockhart, 8 Ala. Rep. 9; Cunningham v Freeborn, 11 Wend. 241.

4. The stipulation in the deed, that the trustee may permit the grantor to retain possession, is not a badge of fraud. See the cases cited in 1 Reavis' Dig. p. 431, § 99; also, Graham v. Lockhart, 8 Ala. Rep. 20; Abercrombie v. Bradford, 16 Ala. Rep. 564–5, which is precisely in point; Barton v. Wheeler, 9 Pick. 21; Brock v. Headen, 13 Ala. Rep. 376.

5. Nor is the retention of possession, under the stipulation, Johnson v. Cunningham, 1 Ala. Rep. 249; Malone v. Hamilton, Minor, 286; Abercrombie v. Bradford, 16 Ala. Rep. 560; ib. 567–8.

6. The discrepancy between the amount of the debt secured in the deed, and the amount proved to be due, cannot affect the validity of the deed; there being no evidence that the amount was overstated, with a fraudulent intent; Pennington v. Woodall, 17 Ala. Rep. 688; Bumpass v. Dotson, 7 Humph. 310, 316.

7. If there were any evidence of a fraudulent intent on the part of the grantor, in making the deed, that could not affect the beneficiaries, who are not shown to have participated in it. Stover v. Herrington, 7 Ala. Rep. 142; Anderson v. Hooks, 9 Ala. Rep. 704; Abercrombie v. Bradford, 16 Ala. Rep. 560.

II. The grantor's possession, was merely permissive, and therefore not subject to be levied upon. Hawkins v. May, 12 Ala. Rep. 677.

For these reasons, the charges of the court were correct.

LIGON, J.—1. The deed which forms a part of the bill of exceptions does not on its face show that it was intended to hinder, delay or defraud the creditors of the grantor. It purports to be made upon a full and ample consideration, and with the intention to save harmless certain persons who had become the securities of the grantor on a guardian's bond, and it further shows upon its face, that the grantor was in arrears to his ward in a sum exceeding the value of the prop-

erty conveyed. The right of a debtor, fairly, and in good faith, to prefer one creditor over another, or over all others, when he finds himself in failing circumstances, is too well settled by this, and other courts, to be doubted at this day. Grimshaw v. Walker, 12 Ala. Rep. 101; 7 Ala. Rep. 143; 4 Ala. Rep. 374; 9 Por. 566.

2. It is also well settled, that the retention of possession by a grantor in a deed of trust, if such possession is consistent with the terms of deed, is not a badge of fraud; nor is it a circumstance from which an inference of fraud would necessarily arise. McGee v. Carpenter, 4 Ala. Rep. 469; Ravisies v. Alston, 5 Ala. Rep. 297; 8 Ala. Rep. 694; 7 Ala. Rep. 235; 6 Ala. Rep. 356. From the bill of exceptions in this case, it appears that the only proof relied upon by the plaintiff in error, in the court below, was, that McMahan, the grantor, was permitted by the trustee to retain the possession of the trust property after the deed was made, until it was taken from him by the plaintiff in error. The deed stipulates that the trustee "is authorized to permit Robert G. McMahan (the grantor) to retain possession of the property conveyed, until a sale becomes necessary, or is most conducive to effect the object of the trust." The possession of McMahan was strictly consistent with one of the terms of trust. It is therefore no badge of fraud, nor is it a circumstance from which fraud must necessarily be inferred. The case, then, stands as though no direct proof of fraud in fact had been introduced on the trial below, and under these circumstances we do not think the court erred, in charging the jury as it did on this branch of the case. It is said by this court, in the case of Sheffield & Co. v. Parmlee, 8 Ala. Rep. 889, that "it is our uniform course to construe the charge of the court in connection with the evidence before it, and the questions raised;" and it has been again and again held here, that where there is no conflict of evidence, it is not error for the court to charge generally, that one party or the other is entitled to a verdict. 15 Ala. Rep. 276; 13 Ala. Rep. 713; *cum multis al.* Here the question was, does McMahan's possession, under the circumstances of the case, furnish evidence of fraud in making the deed? is it a badge of fraud? We have seen that it is not allowed by law to have that effect; so

the case stands as though no proof of fraud had been introduced, and there is no conflict of evidence. It could not, then, be error to charge the jury that, if they believed the evidence, they should find for the plaintiff; and in effect, the charge here given is the same. Had a more specific charge been desired by the defendant, he should have asked for it.

3. To the last charge of the court below, we do not see that any just exceptions can be taken. The deed and the proof both show that McMahan's possession was merely permissive, and was liable to be terminated at the pleasure of the trustee. McMahan could not legally retain it one moment beyond the will of the trustee, and it was not error for the court to say to the jury that he had no such estate in the property, as was subject to levy and sale under execution on a judgment at law. See Hawkins v. May, 12 Ala. Rep. 673. It is a conclusion of law, which the court had a right to draw, and in this case it was a proper conclusion.

There is no error in the record, and the judgment is consequently affirmed.

BRENNAN'S ADM'R *vs.* HARRIS ET AL.

1. It is the duty of the Court of Probate to commit an estate to administration on the application of a creditor, or other person interested in it.
2. But the refusal of the court to grant letters of administration to the sheriff, on the application of a party representing himself to be a creditor, is not an interlocutory or final order, within the meaning of the act of 1850. (Pamphlet Acts, 33, § 29,) from which an appeal lies.
3. The party's remedy is by *mandamus.*

APPEAL from the Court of Probate of Autauga.

This was an application to the Court of Probate to grant letters of administration *de bonis non,* on the estate of John M. Creyon, deceased, to the sheriff of the county. The applicant alleged that said Creyon in his lifetime was indebted to said Margaret Brennan, and that the administrator had died without closing the administration. The court, upon hearing

the evidence, refused to grant the letters of administration, and dismissed the application. An appeal was taken to this court, and a motion is now made to dismiss the appeal.

N. HARRIS, for the motion.

WILLIAMS & COCKE, *contra.*

GOLDTHWAITE, J.—Under the statute, (Clay's Digest, 220, § 1,) the right to letters of administration, in case of intestacy, belongs first to the widow, or next of kin, of the intestate, or some of them; and in case of their refusal, to a creditor. And by the act of 1821, (Clay's Digest, 222, § 10,) authority is given to the judge having jurisdiction, to grant letters of administration to the sheriff or coroner of the county, when no one has been admitted or qualified within three months after the death of the deceased, or when the administration has become vacant by reason of death, resignation, or removal. Under the influence of these statutes, we think there can be no doubt that the Court of Probate having jurisdiction is bound to commit the estate to administration, on the application of any one having an interest therein. A creditor having an interest in the estate, has a legal right to demand that it should be administered; and it is the duty of the Judge of Probate, on his application, to proceed to act in the premises.

But the mere refusal to act in such a case is not final, and cannot legally prejudice any future application. It is neither an interlocutory nor a final judgment, from which, under the act of 1850, (Pamphlet Acts, 33, § 29,) an appeal lies. The remedy is by *mandamus*, Ex Parte Jones, 1 Ala. 15.

The appeal must be dismissed.

MITCHELL *vs.* COWSERT AND WIFE.

1. In detinue by husband and wife jointly, when the record shows such title in the wife as would vest a chose in action absolutely in the husband, and is silent as to the time of the wrongful taking and detainer by the defendant, the

Appellate Court will presume in favor of the correctness of the judgment of the court below, that the proof showed such unlawful taking and detainer to have been before the marriage.

ERROR to the Circuit of Pickens.
Tried before the Hon. William R. Smith.

This was an action of DETINUE. brought by the defendants in error, Cowsert and wife, against Mitchell. They sue and declare in their joint name for the slave in controversy. The parties went to trial, on the general issue and the statute of limitations.

In the bill of exceptions, it is stated that the plaintiffs below, Cowsert and wife, "claimed the negro by virtue of an alleged gift by the grandmother of the wife, before her marriage, in the State of South Carolina." The parties married there, in 1835, and now reside there. "They also relied," says the bill of exceptions, "on a deed from the said grandmother to the wife, conveying to her the said slave, about the 5th January, 1850. There was no pretence or proof of any separate estate in the said Martha, in or to the said negro." These are all the material statements of the bill of exceptions.

The counsel for the defendant below asked the court to charge the jury, that the plaintiffs had improperly joined in bringing this action, and that therefore it could not be maintained. This charge the court refused to give, and the refusal of the court is assigned for error.

HUNTINGTON, for plaintiff in error.

This action is *detinue;* and it is held, that if a man detain the goods of a *feme covert*, which came to his hands before marriage, the husband can only bring detinue, because the law transfers the property to the husband; but both shall join in trover, because the wrong originally commenced when the wife was *sole;* and if such injury be punished, the wife herself, who received the injury, must be party to the action; but even then, if the possession be laid in both (as in the case at bar) it is ill, because if both were possessed, the law will transfer, in point of ownership, the whole interest to the husband. So, if goods come into possession of a *feme covert* be-

fore marriage, detinue lies against the husband only, but *trover* against both, because both are concerned in the trespass. Bac. Abr. *Detinue*, A. To the same effect is Draper v. Fulkes, Yelv. 165, 166; Nelthrop v. Anderson, 1 Salk. 113; Wilbraham v. Snow, 2 Saunders' Rep. 135, where it is also held, that if the wife joins, the declaration must state that the wife, while she was *sole*, lost the goods, that the plaintiff intermarried, and the defendant, after the marriage, converted them. See, also, Buller's N. P. 50. In Whittingham v. Broderick, cited in note to Nelthrop v. Anderson, 1 Salk. 113, it was held, that baron and feme in replevin might join for taking their goods; but it is evident that this was owing to the peculiar nature of the action, and the fact that the avowry admitted the joint ownership. Here, however, the plea put in issue the whole declaration.

J. L. Martin, and Hale, for defendants.

1. A bill of exceptions will be taken most strongly against the party excepting. 5 Ala. Rep. 258; 6 Ala. Rep. 801.

And every intendment, compatible with the facts stated in the bill of exceptions, will be made to sustain the ruling of the court below; and a party complaining of the refusal of the court to give a charge, must set out in the bill of exceptions a state of facts that authorized him to ask it. 17 Ala. Rep. 249.

2. If the slave in question was held adversely at the time of the marriage of Cowsert, and was never reduced to possession after marriage, then the parties properly joined in this action, and there is nothing in the bill of exceptions adverse to this view. 8 Porter, 242, and cases there cited; Broome v. King Adm'r 10 Ala. 819; 2 Haywood, 300; 4 Bibb, 174; or if the only valid title of the plaintiffs below was under the deed of 1850, then, under the law for the protection of married women, the wife took a separate interest in the slave, and was properly joined with her husband. 12 Smedes & M. 347.

Phelan, J.—When the record does not purport to set out all the evidence, no presumption adverse to the correctness of the judgment can be indulged. King v. Crocheron, 14 Ala. Rep. 822. The bill of exceptions in this case does not profess to set out the whole of the evidence.

A bill of exceptions must always be taken most strongly against the party excepting. Mallory v. Stodder, 6 Ala. Rep. 801. For any thing that appears by this bill of exceptions, it was shown on the trial in the court below, that there was both a wrongful taking and an unlawful detainer of the slave in controversy by the defendant below before the marriage of the plaintiffs, and that consequently, at the time of the marriage, nothing remained to the wife but a *chose in action*, or right to recover by suit her property, which had been wrongfully taken and detained before marriage. That in such a case, husband and wife must join in the action for the recovery of the chattel, is too well established to admit of controversy.

Whether the plaintiffs derived title from the gift by the grandmother before the marriage, or by the deed of 1850, does not affect the decision of the case, under the state of facts supposed in reference to the taking and detention of the slave, and as such a presumption may properly be indulged in favor of the judgment, we must hold that there was no error in refusing the charge asked by the defendant below.

The judgment below is affirmed.

ZACKOWSKI *vs.* JONES.

1. The act of 1845, which renders the defendant in execution an incompetent witness on a trial of the right of property, is in derogation of the common law, and extends only to claim suits under the statute.
2. In trespass against the sheriff for attaching plaintiff's goods as the property of his vendor, the vendor is a competent witness for the plaintiff to prove the fairness of the sale to him.
3. When a witness is excluded as incompetent by the primary court, the Appellate Court, in reviewing its decision, can only look to the ground of objection raised in the primary court.

ERROR to the Circuit Court of Dallas.

Tried before the Hon. E. Pickens.

This was an action of trespass, brought by the plaintiff in error against the defendant, who was the sheriff of Dallas

county, to recover damages for the defendant's unlawful act in levying certain attachments against Wolf & Lacks, on a stock of goods which the plaintiff claimed as his property. The plaintiff offered in evidence the depositions of said Wolf and Lacks, to prove the consideration of the sale to himself. The defendant objected to their admission, and the court excluded them, on the ground that the act of 1845, which renders defendants in execution incompetent witnesses, applied to this case; to which ruling of the court the plaintiff excepted.

"It was contended by the plaintiff that a part of the said sale from Wolf & Lacks to plaintiff consisted of a former indebtedness of Wolf to plaintiff. As a part of his evidence to show this, plaintiff offered to introduce in evidence the declaration of Wolf, (made previous to the date of the levy of the attachments, and also previous to the time Wolf & Lacks became indebted to the plaintiff in said attachments,) to the effect that he was indebted in a large amount to the plaintiff in this suit, to which the defendant objected, and the court sustained his objection." To this also plaintiff excepted.

This is all the evidence set out in the bill of exceptions; and the errors assigned are, the exclusion of the depositions and the rejection of Wolf's declarations.

LAPSLEY & HUNTER, for plaintiff in error.

1. The defendants in attachment were competent witnesses. 1st. The statute, as to trials of the right of property, had no application to this case. Lock v. Miller, 3 S. & P. 14; Bennet v. Armstead, 3 Ala. Rep. 507; Wyatt v. Lockhart, 13 ib. 339; 2d. Independent of that statute, they were unquestionably competent.

2. The declarations of the defendants in attachment, or one of them, (which were excluded,) were clearly competent, having been made before the debts, under which the attachments issued, were contracted. Goodgame v. Cole & Co., 14 Ala. Rep.

G. W. GAYLE, *contra:*

1. *So far as interest is concerned*, there is no difference between this case and the case of *transferror of a chose in action.*

The one is no more liable back than the other. In the cases of a transferror offered as a witness, this court has repeatedly decided that *a transferror of a chose* was incompetent. See Goodwin, use, &c. v. Harrison, 6 Ala. 438; Wm. Bower & Co. v. Saltmarsh, 19 Ala. 274.

2. But Wolf & Lacks, the vendors, were *defendants in the attachments*, and are within the meaning of the statute of 1845, excluding defendants in execution, &c. See Yarborough v. Moss, 9 Ala. 388.

3. There is an *implied warranty of title* from Wolf & Lacks to Zackowski, and they are interested in that way.

DARGAN, C. J.—It appears that the plaintiff bought a stock of goods from Wolf & Lacks, and afterwards the defendant, as sheriff of Dallas, levied several attachments upon them, as the property of Wolf & Lacks. The plaintiff brought trespass against the sheriff, and to prove the fairness of the sale of the goods to him, introduced the deposition of his vendors. The defendant objected to this evidence, on the ground that the statute of 1845, prohibiting defendants in execution from giving testimony upon the trial of the right of property, applied to this case, and excluded the witness. The court sustained the objection, and the plaintiff excepted.

It is difficult to perceive why it should be that the witness must be held incompetent under the statute, if the plaintiff had interposed a claim to the goods, under the statute to try the right of property, but to allow him to testify, if the plaintiff saw fit to select his common law remedy. Yet the construction placed on this statute is, that being in derogation of the common law, it excludes the defendant in the execution only upon the trial of the right of property as allowed by our statute, but does not affect his competency as a witness in any other manner. Dearing v. Windham, 11 Ala. 204; Yarborough v. Moss, 9 Ala. 590; Brumby v. Langdon & Co., 10 Ala. 747. We are not disposed to disturb the construction that has been placed on this act, and consequently hold that the witness was not incompetent on that ground.

Other reasons have been assigned in the argument why he should have been excluded, but it is sufficient to say, that we can look alone to the ground of objection made in the court

below; it was on this only the court acted, and to this must we be confined. But it may not be improper to say, that as the case is now presented to us we see no reason why the witness should be excluded.

The declaration of Wolf, one of the vendors, made prior to the sale, respecting his indebtedness to the plaintiff, was properly rejected; such declaration formed no part of the *res gestae*.

Let the judgment be reversed, and the cause remanded.

WALKER *vs.* FENNER ET AL.

1. To entitle the plaintiffs to recover in action of detinue, they must show that the defendant, either at the time of the demand made, or, if no demand was made, at the time the writ was sued out, had the actual possession, or the controlling power over the property; unless, having the possession anterior to such demand or suit, he has wrongfully, or to elude the plaintiff's action, parted with it, or unless he holds it under a contract of bailment, the terms of which he violates by failing to re-deliver it.
2. If a party who has the possession of personal property *pur autre vie*, hires it out for the usual period of hiring such property, and the life estate determines pending the term, he is guilty of no wrong to the remainder-men who may in such case bring detinue against the person in actual possession, or wait until the hiring expires, and the property is returned to the former possessor.

ERROR to the Circuit Court of Lauderdale.

Tried before the Hon. Thomas A. Walker.

R. W. WALKER, for plaintiff in error:

The question presented is, whether the defendant is liable in detinue, where the property sued for was, at the time the plaintiff's right to the possession accrued, and when the action was brought, in the possession of the defendant's bailee, for hire for an unexpired term.

1. The *gist* of the action is the wrongful *detainer*, and not the original *taking*, and a necessary result of the principle is, that in order to maintain the action, the plaintiff must show an actual possession, or a general controlling power over the chattel by the defendant, at the date of the writ. 4 Dev. &

Batt. 468; Jones v. Green, 4 ib. 354; 10 Iredell, 424; Hall v. White, 3 Carr. & Pay. 136; 1 Saunders, Pl. & Ev. 436; 10 Ala. 960; 2 Steph. N. P. 1309, 1311; see also Gaines v. Harvin, June Term, 1851; 10 Ala. 960.

In this case the defendant was not in actual possession, nor did he have the general controlling power over the negroes at the date of the writ. The defendant's bailee had both, and his disturbance of their possession, or interference with their general controlling power, would have been a trespass, for which the law gives them a clear remedy against him. Their actual possession was not his constructive possession. Constructive possession is the *right* to the *immediate* possession. The defendant could not, for any injury to or conversion of the slaves during the term of hire by a third person, maintain either trespass or trover. The bailee alone could do so. Leaird v. Davis, 17 Ala. 448; 8 Porter, 133; Abercrombie v. Bradford, 16 Ala. 560, 567–8; Railroad Co. v. Kidd, 7 Dana, 245; Clark v. Poozer, 2 McMullen, 434; Andrews v. Shaw, 4 Dev. 70; 11 Ala. 863; 2 Greenl. Ev. §§ 614, 616.

The action of detinue being an action for the recovery of a specific chattel, it seems clear that the defendant must be, when suit is brought, in a condition to relieve himself from the consequences by a delivery of the property. The writ is a *demand* of the property, and this demand must be made on some one who can comply with it. If it is *impossible* for the defendant to deliver the property, the action does not lie, and it is immaterial whether the impossibility results from the anterior destruction of the chattel, or from a contract made by the defendant, which, at the time it was made, was legal and valid. If the defendant cannot *legally* deliver the property, then, in contemplation of law, it is impossible for him to deliver it. An illegality is an impossibility. See Lindsay v. Perry, 1 Ala. 203; Foscue v. Eubanks, 10 Iredell, 424.

2. Possession by the defendant anterior to the date of the writ is sometimes sufficient, but only in two classes of cases:

First, where the defendant has been in possession before suit, and has unlawfully, or to elude the plaintiff's action, and in fraud of his right, parted with the possession.

Second, where the action is *ex contractu*, and grows out of a contract of *bailment*. In the latter case, possession before suit

is sufficient, because there the defendant has contracted to return or deliver the chattel to the plaintiff, and it is his failure to comply with this contract which is the ground of the action. His parting with possession before suit is a violation of his contract, an *unlawful* dispossession.

These positions are clear on principle and authority; Caldwell v. Morton, Riley's Law Cases, 277; Kershaw v. Boykin, 1 Brevard, 301; Pool v. Adkisson, 1 Dana, 110, 118; Rucker v. Hamilton, 3 ib. 36, 44–5; 5 Carr. & P. 353; Jones v. Dowle, 9 Mees. & W. 19; Nelson v. Iverson, 17 Ala.; 1 American Leading Cases, 115; 3 Comyn's Digest, 364; 2 Steph. N. P. 1312; Browne's Actions at Law, top p. 258.

The defendant in this case exercised a plain legal right in hiring out the slaves. At the time he did so, the life estate had not fallen in. He parted with the possession *lawfully*, therefore, and not evasively, or in fraud of plaintiff's action, or in violation of any contract with the latter. Graham v. Penman, 1 Brevard, 399; 2 Hill, 554; 6 Humph. 55, 57.

3. It is a conclusive answer to the action, that defendant *never had actual or constructive possession of the slaves at a time when the plaintiffs were entitled to the possession.* The plaintiffs claimed as remainder-men after the death of Robert Fenner, who died in September, 1847. The suit was brought in October, 1847, and the defendant (who held during Robert Fenner's life) had, on 1st January, 1847, hired out the slaves for twelve months. It is clear that if a prior possession will suffice at all, it must be a possession at a time when the plaintiff is entitled to the property; because, a possession when the plaintiff is not entitled to the property, is not the possession of the plaintiff's property. Graham v. Penman, 1 Brevard, 399; Rucker v. Hamilton, 3 Dana, 36, 44–5; Andrews v. Shaw, 4 Devereux, 70; 4 Dev. & Batt. 323; Cole v. Robinson, 1 Iredell, 541.

4. Possession by defendant *after* suit, and at the *trial*, is immaterial. The pleadings relate to the date of the writ. The plaintiff must have his right then, and the defendant be then liable. 5 St. & P. 123; 8 Porter, 564, 575; 13 Ala. 208, 218; 1 Stew. 536; 10 Iredell, 424.

ORMOND & NICOLSON, *contra:*

The only question raised upon the record is, whether the possession of one to whom negroes are hired, is such as inures to the bailor, so that the action of detinue may be maintained against the bailor, or one who hired out the negroes, before the expiration of the term of hiring.

In the case of Magee v. Toland, 8 Port. 36, the facts were, that Toland had married Miss Carnathan, a minor, that at the time of the marriage her guardian had hired out the negro sued for. She died before the term of hiring had elapsed, and the only question was, whether there was such a possession in Toland, as that his marital rights could attach. The court had no difficulty in arriving at the conclusion that the possession of the bailee was the possession of the bailor; that was almost assumed. The only question of any difficulty was, whether the possession of the guardian was the possession of the ward. The case determines that it was, and that detinue was maintainable by the husband. True, the action was brought against the bailee, but the court expressly says, that under the hiring, *his* possession was the possession of the bailor, and if that be true, the action could well be maintained against either, for a constructive possession is sufficient for this action. Toland's marital rights attached, in the case cited, under the principle that the possession of the bailee was the possession of the bailor; but the law says, that the personal property of the wife must be reduced to possession, and the court is reduced to the necessity of saying, that a higher *nature of possession*, a *more actual* possession is demanded for the action of detinue than for the marital rights of a husband, or else disavow the case of Magee v. Toland.

Hiring is a species of bailment. Story on Bail't, 262, § 396. The case of Ricks v. Dillahunty, 8 Port. 133, does not decide that it is not. As to the contract between *the parties*, a hiring may be, and doubtless is, governed by the principles regulating sales; but that it is a *purchase*, in the broad, legal sense of the word, is not true. If it is, why did this court say, in Abney v. Kingsland & Co. 10 Ala. 365, bottom of page, that though as a general proposition, it was true a limited estate in personal property may be sold, yet that it did not follow that the interest of a hirer of a negro could be sold? If the doctrine contended for on the other side be true, would this

have ever been made a question. There would have been no doubt that a negro thus situated could be sold under execution.

The case of Ricks v. Dillahunty was never intended to disturb the law of bailment, as it has stood for more than one hundred years. The question there was, whether the hire should be abated in consequence of the death of the negro before the expiration of the year, and in that respect, the contract between the parties is governed by the law regulating sales. That was all that it was necessary to decide, and is undoubtedly sound law. The broad language used in that case led, no doubt, to the act of 1848–49, prohibiting sales of negroes hired out, which shows that it is the policy of the State to regard *hiring* as a bailment.

That the hiring of a negro is a bailment, see Story on Bailment, 262; Hawkins v. Pythian, 8 Monroe, 515; Mellen v. Ensley, 8 Humph. 428; 10 Ala. 365, last par. of Abney v. Kingsland.

2. It is argued, however, that Walker, being the purchaser of a life estate, had a right to hire out the negro for a year. It is true he had the legal right to make the contract, but that contract must be in subordination to the duty which he himself was bound to perform. What was that? It was, to turn over the negroes to the remainder-men as soon as the life estate fell in. And can he claim exemption from the performance of this duty, by pleading his own act in excuse? He has brought about this state of things, and now sets up the technical law of hiring, as he interprets it, as an excuse for himself. He knew what his duty to the remainder-men was, and he had no right to clog that duty with any such contract as he has made. "A tenant *for life of a personal estate, and his privies, are trustees* for those in remainder," 3 Bac. Ab. 471; 2 McCord, 149. Walker being trustee for those in remainder, his contract necessarily terminated with the life estate, and he had no right to place himself in such a position as not to be able to turn over the estate to those in remainder. If his bailee would not give up the negroes, it is surely not our fault, but Walker's; he should have made it a part of the contract of hiring.

Was not the possession of Walker, through his bailee, tor-

tious from the moment of Fenner's death? it being his duty to turn the negroes over to defendant in error when, and as soon as the life estate fell in.

Detinue may be maintained against one who had possession of the property, although he may have parted with it at the time suit was brought. Bac. Ab. Detinue, 135; Burnley v. Lambert, 1 Wash. 309; Pool v. Adkisson, 1 Dana, 44; Mees. & Welsby, 19; 3 Howard, Miss. 394.

CHILTON, J.—The plaintiff in error, having purchased the life estate of Robert Fenner, hired the slaves, for the recovery of which this action is brought, to Messrs. Bliss and Kirkman, for the term of one year. Pending this term, Robert Fenner died, and the right of the defendants in error as remainder-men to the possession of the slaves accrued. Having commenced their action before the expiration of the term, and while the slaves were in the actual possession of Bliss and Kirkman, the question was raised in the court below, in the prayer for instructions to the jury, whether, under the circumstances, detinue will lie.

On the part of the plaintiff in error, it is insisted that the gist of this action is the wrongful *detainer*, and not the original *taking*, and that as a result from this principle, in order to maintain the action, the plaintiff must show an actual possession, or such a general controlling power over the chattel by the defendant at the date of the writ, as would enable him to surrender it in the event of a recovery. On the other hand, it is argued that the possession of the bailee is the possession of the bailor, or the person who lets to hire, and that if the latter disposes of the actual possession for a period beyond the termination of his estate, making no provision in his contract for a return of the property upon the happening of the event which is to terminate his interest, this is his fault, which should not avail him as a defence. I am free to confess that there is force in this argument, and that it derives additional strength when applied to this case, from the fact that, according to the contract of hiring which the defendant below set up, the actual possession of the slaves would be returned to him some eight months anterior to the trial term of the suit.

I have carefully looked into the authorities bearing upon the point, to a few only of which I will refer, and think it may be safely asserted as the correct rule deducible from them, that to entitle the plaintiffs to recover, they must show that the defendant, either at the time of demand made, or in the event there was no demand, at the time the writ was sued out, had the actual possession, or the controlling power over the property, unless, having the possession anterior to such demand or suit, he has wrongfully, or to elude the plaintiffs' action, parted with it, or unless he holds it under a contract of bailment, the terms of which he violates by failing to redeliver it. Perhaps an exception to the rule obtains in cases where the defendant represents that he has the goods, and thereby induces the owner to bring the action against him. 3 Bar. & Cres. 136; 1 Chitty Pl. 125, mar. The author just cited says: "Detinue does not lie against a person who never had the possession of the goods; as against an executor on a bailment to the testator, unless the goods came to the possession of the executor; nor against a bailee, if before demand he lose them by accident; though, if he wrongfully deliver the goods to another, he will continue liable."

The books are agreed that the detention is the *gist* of this action. By "detention" is meant that the defendant withholds the goods, and prevents the plaintiff from having possession of them. Did the defendant below detain these slaves when the suit was commenced against him, there being no previous demand? It is clear that he had neither the possession, nor the immediate right of possession. The persons hiring the property had, as against him, for the term during which the hiring continued, both the possession and the right of possession; consequently, he could not be said to have detained them from the plaintiff, as he neither had them nor the control of them so as to make the delivery. See Clemts v. Flight, 16 Excheq. Rep. 42; Charles v. Elliott, 4 Dev. & Bat. 468, which is a stronger case than the one before us; for in that case defendant, who claimed the slave as a trustee under a void deed, put him in the hands of his co-trustee to avoid the plaintiffs taking forcible possession of him. The co-trustee had sent him beyond the State, but without the knowledge or consent of the defendant. The

court, held that it was generally incumbent on the plaintiff to show either an actual possession in the defendant, or a controlling power over the chattel at the date of the writ, citing Anderson v. Passman, 7 C. & P. 193; Leigh's N. P. 782, and under the facts of th t case, disallowed the action. In the case of Jones, administrator, &c., v. Greene, same book, Judge Ruffin affirms substantially the same doctrine.

In Kershaw v. Boykin, 1 Brev. 301, the court say: "It is true the defendant must have possession of the thing sued for, at the time of bringing the suit, 4 Rep. 83; and if he had been *lawfully* dispossessed before, the action will not lie; citing 1 Wash. 311. But it is otherwise, although the thing be not in the possession of the defendant at the time, if he has wilfully or fraudulently parted with the possession to avoid the suit;" citing 3 Com. Digest, 358; Haw. 12.

The doctrine that where there has been no wrongful or elusive disposition of the property, it must be shown that the defendant was at the time of demand, or of the commencement of the suit, either actually or potentially in possession of the property, was asserted by Tindal, C. J., in Garth v. Howard, 5 C. & P. 346; see also Ford v. Caldwell, Riley's L. Rep. 277, and Burton v. Brasher, 3 A. K. Marsh. 278.

These authorities may suffice to show that this action could not properly have been maintained, unless it were shown that the defendant had parted with the property wrongfully or fraudulently to affect the plaintiff's right to the action; and upon this point, there was no proof whatever to show that the disposition of them, at the time it was made, was in any wise improper. But on the contrary, holding for the life of another, and his estate being uncertain as to the time of its termination, Walker might well have hired the slaves for one year, without any inference of injury to the rights of the remaindermen. According to the common law, the representatives, under-tenants, or lessees of the tenant for life are ntitled to the emblements or profits of the crop, if the estate terminate before harvest, and this results from the nature of his estate, which is contingent and uncertain in dura ion, and this uncertainty shall not prejudice him. Co. Lit. 42; 3 Bla. Co n. 35. We think, by analogy to such case, the party in possession of personal property *pur autre vie*, and who hires

it out for the usual period of hiring such property, is guilty of no wrong against the remainder-men, should the life estate terminate pending the term. The plaintiff can proceed in detinue against the person in actual possession, or he may wait until the hiring expires and the property is returned to the person who let it to hire.

As there was no proof in this case raising any presumption unfavorable to the defendant in respect to the manner of his dispossession at the time the action was brought, and as he had *bona fide* parted with the possession of, and the dominion and control over the slaves, and was not therefore potentially possessed, we are of opinion that the court erred in refusing the instructions prayed for. Its judgment is therefore reversed, and the cause remanded.

MAY ET AL. *vs.* BARNARD.

1. A denial in an answer which is responsive to the allegations of the bill must prevail, unless disproved by two witnesses, or one witness with strong corroborating circumstances.
2. When judgments are impeached and sought to be set aside in equity for fraud, the plaintiffs in such judgments are indispensable parties to the bill, and no decree can be rendered in favor of the complainant, without making them parties.
3. Where two defendants, who are neither partners in interest, nor privies in estate, are charged to be jointly concerned in the perpetration of fraud, the answer of one cannot be read as evidence against the other.
4. When an account is called for by the bill, and given in the answer, it must be regarded as responsive matter, and as *prima facie* evidence of the state of accounts between the parties.

ERROR to the Chancery Court of Greene.

Tried before the Hon. W. W. Mason.

Henry Barnard exhibited his bill against John May and Joel Grizzle, in which he charges that at the November term of the County Court of Greene for the year 1840, he recovered a judgment against Grizzle for $450 71-100, and costs; that *fi. fa.* was issued on it, and returned no property found;

that the judgment is yet unsatisfied; that at the commencement of the suit, and for some months afterwards, Grizzle owned a tract of land in Greene county, and a number of slaves, horses, mules, &c., a carriage and harness, wagons, and farming tools, with crop of cotton and corn, in all worth at least $15,000; that Grizzle was in debt, but to no great amount, was intemperate and a confirmed drunkard; that his health of body and mind was impaired; that he was easily influenced, and incapable of attending to business; that May, with intent to defeat the collection of complainant's debt, and the demands of Grizzle's other creditors, availed himself of Grizzle's drunkenness and imbecility, and by improper influences prevailed on G. to execute to him (May) on the 17th August, 1840—complainant's suit being then pending against Grizzle—a deed or deeds, conveying to him (May) all the property of said Grizzle of every kind, in which Mrs. Grizzle united, and it was duly recorded; that by this means Grizzle was left without property when complainant's execution issued, and has remained so up to the filing of the bill; that the deed was fraudulent, and was intended by Grizzle and May to defraud the creditors of the former; that as an inducement for Grizzle to make it, May promised him that he should still have the use of it; that Grizzle was drunk when the deed was made; that after the deed was made, certain creditors of Grizzle threatened to levy on the property, and May, fearing that the deed might be set aside for fraud, procured Grizzle to confess sundry judgments before a Justice of the Peace, for large amounts, some of which were fraudulent, and without consideration; that May procured executions to issue on these judgments, and levies to be made on the personal estate of Grizzle, prior to the levies by the sheriff, and had said property, except the crops, sold to satisfy them, and bought most of it himself, and so claims to hold under his purchase at said sale; that at said sale he prevented the creditors of Grizzle, and others who were present, from bidding, by false representations, Grizzle aiding him, and by this means he was enabled to purchase at an inadequate and unfair price; that said sales were fraudulent and void; that the consideration named in the deed from Grizzle to May was fictitious and nominal; that Grizzle owed May nothing at the time, and

some of the debts mentioned in it were also fictitious, but if all were just and paid by May, the price would be grossly inadequate; that Grizzle made another deed to May, but it is not recorded, and was fraudulent; that the deed made on the 17th August, 1840, though absolute on its face, was accompanied by a deed of defeasance from May to Grizzle; that May still holds the property, has sold some of it and received the proceeds; that he sold the crop which at the date of the deed and sale was growing on the premises, and has appropriated the proceeds. The bill calls on May and Grizzle for a full discovery as to all the matters charged, by special interrogatories based on each charge, and especially on May for discovery and account as to the crop of cotton growing on the land in the year 1840; and prays that the deed of 17th August, 1840, may be declared void for fraud, the sales under the executions be set aside; for an account showing what is due complainant, and that the property be subjected to sale to pay the same. With the bill is exhibited a transcript of the record of the judgment at law in favor of the complainant against Grizzle, and also a copy of the deed from Grizzle to May, dated 17th August, 1840.

May answers and admits the recovery of the judgment by complainant against Grizzle, the issue of execution, and the return of "no property found." He also admits that at the time the suit was brought, Grizzle owned two hundred and forty acres of land, and twelve or thirteen negroes, a carriage, horses, crop, &c. Denies that said property was worth $15,000 —that Grizzle was in debt beyond the value of his property —that he was a drunkard, and unfit for business when intoxicated, but shrewd and competent when sober. He admits the execution of the deed of the 17th August, 1840, but denies that it was made to defraud the creditors, and states the object of the deed to have been the giving an honest preference to the individual creditors of Grizzle over a creditor to whom he had become bound as surety for one Pearson. He denies that the property intended to be conveyed by that deed was all that Grizzle owned at the time; that he owned three or four other slaves, which were levied on and sold by the sheriff of Greene county for the payment of his debts. He denies that he used any means improper or otherwise to

procure Grizzle to make the deed, but avers that it was done at Grizzle's suggestion, for the purpose of providing for the payment of his own debts, in preference to those for which he was surety; that Grizzle requested respondent to take his property and pay certain debts which were named, and which were all that he could remember, and which amounted to about $4000, which respondent agreed to do, and the deed of the 17th August, 1840, was made to carry out this agreement, and for no other purpose, and the sum of four thousand dollars, mentioned in it as due to respondent, was for the money thus agreed to be paid by him for Grizzle; that Grizzle was sober during these transactions. He gave Grizzle a writing when the deed was made, the terms of which he does not remember, but it was intended to embody respondent's agreement to pay the debts named, and to account to Grizzle for any surplus the property might bring over and above the debts to be paid by respondent; that respondent took the property in possession, and kept it awhile under this deed, but upon learning that there were executions in the hands of the sheriff of Greene county, the liens of which had attached before the deed was made, he and Grizzle agreed to abandon the deed, and respondent now sets up no claim whatever under it, though he had become liable for some of the debts intended to be secured by it, before it was abandoned, and has since paid them.

After the deed was abandoned, he advised Grizzle that if he wished to secure his individual creditors, it would be best for him to confess judgments before Justices of the Peace in their favor for the sums due them, have executions issued and levies made on the property by a constable, before the sheriff could levy for the security debt. Grizzle's creditors also pressed him to do this, and it was accordingly done. Respondent had kept the *personal property* out of the way of the sheriff while these arrangements were being made, but delivered it to the constable when they were consummated; that in the meantime the sheriff levied on and sold the land, and respondent became the purchaser for a full and fair consideration, in open market, and without any understanding or agreement whatever with Grizzle; that he bought for himself, and has ever since held for himself alone. He denies all fraud

in said sale, or that there is any secret trust in favor of Grizzle; that the constable sold the negroes and other personal property according to law, openly and in the presence of a crowd of persons, many of whom were bidders, and several of whom became purchasers; one of Grizzle's creditors bought two of the slaves, and other persons bought horses and mules; that respondent purchased most of the slaves, and the greater portion of the horses, cattle and plantation tools. He denies that his purchase was fraudulent, or that he bought under any secret or public agreement with Grizzle, or that Grizzle was in any manner interested in his purchases, but avers that he bought as the highest bidder, at fair sale, for fair prices; that he paid his own money for the property; that he has ever since held and used it as his own, and that Grizzle, since respondent's purchase, has had no interest whatever in it. He denies that he used any means to prevent persons from bidding at the sale, or had any knowledge of or agency in any effort made by Grizzle, or any other person, to accomplish that end; that he believes the debts on which the judgments were confessed were all really due from Grizzle to the persons claiming them, and that after the sale of all his property, Grizzle still owed many debts; that he claims none of the property purchased by himself, whether real or personal, under any contract made with Grizzle, or under any deed made by him, but he holds the land under his purchase from the sheriff, and the personal estate under his purchase at the sale made by the constable. He admits that he gathered and sold the crop of cotton grown on the land by Grizzle in the year 1840; that it amounted to thirty-eight bales, weighing from 450 to 500 pounds each, but that he gathered it with his own hands, hauled it with his own teams, ginned it at his own gin, furnished the rope and bagging at his own expense, and paid all charges incident to its shipment, storage, and sale out of his own funds—for all these things he claims to be entitled to two-thirds of the cotton, as a fair compensation; that the balance of the cotton was worth about $400, but that before he received this money, Grizzle owed him $784 12-100, for money paid, and assumed to be paid on his account, besides the hire of two slaves for two years, and provisions for his family for the same length of time, and

these last items exceed in value Grizzle's portion of the cotton crop.

Exceptions were taken to this answer and sustained, and the defendant was required to answer fully.

In his further answer, he names and values the slaves and other property conveyed by the deed, as also the slaves, &c., purchased by him at sheriff's and constable's sales, and states what became of it. He further states that the nett proceeds of the cotton crop were $1250, and of the corn crop $200.

Grizzle answers, admitting the justice of complainant's demand. He also states that the deed to May, of the 17th August, 1840, was made at the instance and suggestion of May, and for the purpose of defeating the collection of a large judgment rendered against him as surety for one Pearson; that under that deed he put May in possession of the property conveyed by it, who retained it until the land was sold by the sheriff, and the personalty by the constable, under executions issued by a Justice of the Peace, before whom respondent had confessed sixty-odd judgments in favor of *bona fide* creditors; that when he made the deed to May, he did not owe May four thousand dollars, as recited therein, but May agreed to pay that sum to respondent's creditors, but that he never did do so; that May gave him an instrument of writing made concurrently with the deed, similar in import with the deed itself; that May advised the confessions of judgment, and the sale under them, and promised and agreed with the respondent to purchase the property at the sale by the constable, leave the negroes and stock on the plantation formerly owned by respondent, employ him as overseer, dispose of the crops grown, and apply the nett proceeds to the payment of the sum he had advanced in the purchase of the property, and when this amount, with eight per cent. interest, was refunded him by this means, he was to convey the property to respondent; that pursuant to this agreement, May purchased all the property at the sale by the constable, except a horse or two, and two slaves; that after his purchase, May denied his agreement, and has constantly since kept and claimed the property as his own.

There was no proof by either party, and the cause being submitted on bill, answer and exhibits, the Chancellor held

the deed of 17th August, 1840, to be fraudulent as to creditors, and as such null and void; that the confessed judgments were also fraudulent, and as against the complainant they should be set aside; that the sale under the executions issued on the confessed judgment was fraudulent, and vested no title in the purchaser; that the property in the hands of May should be charged with the payment of complainant's debt, and that an account should be taken to ascertain the amount due him, and a report be made at the next term.

The defendants sued out a writ of error, and in this court assign the decree of the Chancellor for error.

Clarke & Murphy for plaintiffs in error.

1. May holds the land under a purchase at sheriff's sale, and the personal property under purchase at constable's sale. This places him, as to title, in the same situation that the plaintiffs in execution would have been, if they had purchased. 9 Ala. 439.

2. The deed may be admitted fraudulent, and that the parties had a right to abandon it, and claim under the sale a *bona fide* judgment. 8 Ala. 115.

3. If a judgment be valid in its creation, i. e. *bona fide*, and upon sufficient consideration, though execution be taken out and enforced with a view to hinder and delay creditors, and it has that effect, yet it is not fraudulent within the statute. 6 Cowen, 284.

4. The judgment was *bona fide*. If then the combination between Grizzle and May was illegal, and May bought to deliver the property back to Grizzle, or bought for Grizzle, then complainant could have levied his execution at law, and sold the property. His remedy at law would have been full, adequate and complete, and he could not come into equity.

5. If there was any impropriety in the sale, or an improper execution of the *fi. fa.*, his mode of redress was to move the court from which the writ issued to set aside the sale. 9 Por. 679.

6. If May and Grizzle did conspire, and did, by covin and fraud, defeat or injure the plaintiff, his redress would be an action on the case at common law. 4 East, 1; 5 Term Rep. 235. If the plaintiffs in the judgments that were confessed

conspired with them, a bill in chancery would be proper to set aside their judgments.

7. The judgment could not be set aside unless the plaintiffs therein were made parties.

E. W. Peck, for defendant.

I. The deed from Grizzle to May is void as to the defendant, because it was made to the intent to hinder and delay the creditors of the said Grizzle. The answer of May makes a general denial of fraud. This is not sufficient to be of any value to him; he should have denied the facts stated, as the evidence of the fraud. 2 Har. & John. 292; 3 Paige, 557.

II. The facts admitted, both in the answer of May and Grizzle, establish the fraudulent character of the deed: 1. The deed is absolute on its face, but a secret defeasance was made by May for the benefit of Grizzle. 2. The consideration is admitted to be simulated. 3. It was made for the express purpose to prevent the property from being seized by the sheriff for the payment of certain debts of defendant Grizzle.

III. A deed fraudulent as to one creditor, is void as to all creditors. Hoke v. Henderson, 3 Dev. 12–14.

IV. A deed void on the ground of absolute fraud, is void *ab initio*, and will not be allowed to stand as security to grantee for advances made. 4 John. Rep. 536; 7 Ala. Rep. 269.

V. If the intent of a deed is to hinder or delay creditors, it is against the statute of frauds, though made upon good consideration, and for the equitable purpose of an equal distribution of an insolvent grantor's effects among his creditors. 8 Dana's Rep. 263.

VI. The purchase of the defendant May at the constable's sale is void as to the defendant in error. The answer of May admits, that after it was discovered that the executions in the hands of the plaintiff had created a lien before the date of the said deed, he advised Grizzle that the only way to save the property from the sheriff was to confess judgments before a Justice of the Peace, have executions issued on them, and levied on the property before a levy was made by the sheriff. That thereupon Grizzle confessed sixty-three judgments,

upon which executions were issued and levied on the property. While this was being done, he, May, secreted the property to prevent a levy by the sheriff. The property was then sold by a constable, and May become the purchaser.

The confession of these judgements was a mere device resorted by Grizzle, on the advice of May, to defeat his creditors in the collection of their debts, after he had failed to effect the same object by the instrumentality of the said deed.

This purchase is void, because these judgments, by confession, are no evidence that the debts on which they were so confessed had any existence in fact.

Because, sales ostensbly made under executions, but in fact collusively, and for the purpose of securing the property from defendant's creditors, stand on the same footing as mere private sales, made with the same object. 7 Dana's Rep. 259; Abney v. Kingsland, 10 Ala 363–364.

Sales, to be valid against creditors, must not only be for valuable consideration, but *bona fide.* A purchaser, even, under the executions of *bona fide* creditors, is not protected, by *their merit*, in his purchase, which he makes in combination with the debtor, to hinder, delay or defraud other creditors. 7 Monroe, 485.

If a debtor causes a judgment to be confessed in favor of a particular creditor, to be made use of for his own purposes, so as to effect a sale and change of his property, the sale is void. 4 John. Ch. Rep. 682.

If a purchaser, knowing of a judgment, purchase with the *view and purpose* to defeat the creditor's execution, it is iniquitous and fraudulent, notwithstanding he may have given a full price; for it is assisting the debtor to injure the creditor. The question of fraud depends *on the motive.* The purchase must be *bona fide*, as well as upon a valuable consideration. 2 Kent's Com. 512; Ayres v. Moore, 2 Stewart, 336.

VII. In this case, the answer of Grizzle is evidence against May. The rule is, where the defendants have a joint interest, or the party against whom the answer is offered, claims through his co-defendant, the answer is evidence. Julian v. Reynolds, 8 Ala. Rep. 683. Here it appears by the answers of both defendants, that May claims through his co-defen-

dant; besides both defendants have an interest in the deed, alleged to be fraudulent, May, by the deed, and Grizzle, by the secret defeasance, executed by May simultaneously with the deed, for his benefit. Again, here the parties had a joint object in view in making the deed, that is, to prevent certain creditors of Grizzle from reaching the property embraced in the deed, to satisfy their debts; and this appears by the answers of both defendants; the answer of each is therefore good evidence against the other. Van Reinsdyke v. Kane, 1 Gall. 630–635; 1 Greenl. Ev. p. 210, § 178; Abney v. Kingsland, 10 Ala. 361.

LIGON, J.—This bill is filed by a judgment creditor against his debtor and one who, as he charges, fraudulently holds property, on a secret trust in favor of the debtor.

1. It charges that the defendant, May, claims to hold under a deed from his co-defendant to himself, dated 17th August, 1840, and that he derives his title from this deed. This charge is denied in express terms by May, and virtually by Grizzle. As these denials of the answers are responsive to the bill, and as there is no testimony to disprove them, they must be taken as evidence for the defendants, and as establishing the fact that the defendant May does not hold the slaves, and other property sought to be charged by the bill, under the deed from his co-defendant Grizzle. Both the defendants are interrogated on this point in the complainant's bill, and the rule is, that if an answer be responsive to a statement or a charge in the bill, or an interrogatory authorized by either, it is evidence for the defendant, and must prevail, unless it is disproved by two witnesses, or one with strong corroborating circumstances. Fenno, *et al.* v. Sayre & Converse, 3 Ala. Rep. 458; Br. Bank at Huntsville, v. Marshall, 4 Ala. Rep. 60.

This view of the pleadings relieves us from inquiring into the character of the transaction out of which originated the deed of 17th August, 1840; as well as from pronouncing on the validity or invalidity of that instrument.

2. The bill also charges, that the confession of judgment before the justice of the peace by Grizzle was fraudulent, and that some of the debts, on which such judgments were con-

fessed, had no real existence, but were simulated and fictitious. On this charge also, a direct interrogatory in the bill is founded, and both defendants are called upon to answer. They both answer, that the debts on which those judgments are based were *bona fide*, and May answers that they were confessed by Grizzle, so far as he knows or believes, for the purpose of preferring these creditors over others, on whose debts Grizzle was only security. Here, again, the rule heretofore laid down may be properly invoked, and as there is no proof to override the denials of the answer, they must be regarded as true, and be allowed to establish the fairness of this transaction. But on this bill, with its present allegations, to which the creditors of Grizzle, who are plaintiffs in those judgments, are not parties, the complainants would not be allowed to inquire into these judgments with the view of impeaching, and setting them aside, for the fraud of Grizzle in confessing them, even if that could be established; since, if the debts were *bona fide*, and the creditors did not participate in the fraudulent intent, their rights would not be affected by his fraud.

The only bearing it could have in a controversy between the present parties, if it existed at all, would be, by connecting May with it, to use it as a fact from which, with others, fraud in the sale under the judgments might be presumed; but its force, in this respect, is entirely broken, by the positive responsive denial of its existence in the answer of May, and the total absence of all proof to establish it.

But it is insisted that, the connection between Grizzle and May, in the perpetration of the several fraudulent practices charged in the bill, is so intimate, that the admissions in the answer of Grizzle should be received as evidence against May. The well established rule in chancery practice is, that the answer of one defendant cannot be read as evidence against his co-defendant. Gresley's Equity Ev. 24. The exceptions are, where there is an identity of interest, as where all the defendants are partners in the same transaction; and where the defendant whose answer is read, and the defendant sought to be charged, are privies in estate. Gresley Eq. Ev. 25 and 322. There may be other exceptions, but they must be all founded on the same rule which governs those above

enumerated, and which cannot apply to the case before us. May is in nowise connected with the fraud imputed to Grizzle, except by the unsupported allegations of the bill, and the equally unsupported answer of Grizzle; he is no partner, and not claiming under the deed from Grizzle, he is not his privy in estate; and, we apprehend, it would be difficult to find a princple, or an adjudged case, which would, under such circumstances, allow the reading of the answer of either of these defendants against the other. The case of Abney v. Kingsland, 10 Ala. Rep. 361, and Van Reinsdyke v. Kane, 1 Gall. 620, and the principle laid down in 1 Greenleaf Ev. 210, § 178, to which we have been referred by the defendant's solicitor, fall far short of doing so.

2. We come now to consider that part of the case which relates to the purchase of the slaves, and other property, by May, at the sale made by the constable, under which alone he sets up his title. Here the answers of the two defendants are essentially at variance. Grizzle answers that May purchased for his benefit, that the ownership of the slaves was nominally to be in May, while he was to take the actual management and control of them, and out of the proceeds of their labor to refund to May the money advanced in the purchase, with lawful interest, and when this was done he was to become again the absolute owner of the propersy. He also admits facts, transpiring at the time of the sale, which, taken in connection with what he states concerning his agreement with May about the purchase, would go far to establish a purpose on his part, in which May was a participant, to defraud his creditors. But May denies, in terms the most clear and explicit, all the allegations in the bill of fraud in this sale. We have seen that the answer of Grizzle is not evidence against May, and this part of the complainant's case, like those we have been considering, is wholly unsustained by proof. May is directly called on by the bill to discover and show his title to the property sought to be charged, and in his answer he asserts that he purchased it in open market, at constable's sale, fairly, and for a full consideration. This is responsive matter, and uncontradicted as it is, by any proof on the part of the complainant, it must be regarded as true, and is evidence of his title. Fenno v. Sayre & Converse, 3 Ala. Rep. 458.

4. The bill also charges, that May got possession of, and applied to his own use, the crop of corn and cotton raised by Grizzle in the year 1840, and calls on him to show and set forth, what became of the proceeds, and to discover the amount. To this he answers that the nett proceeds of the corn were two hundred dollars, and of the cotton twelve hundred and fifty dollars; but further answering, to that part of the bill which calls on him to show how he had appropriated the means arising from this source, he sets forth an account of his own against Grizzle, for money paid on his (G.'s) account, for labor in saving and preparing the cotton for market, for expenses attending its shipment and sale, for provisions furnished Grizzle and family, and for slave hire, which greatly exceeds the amount to which the latter would have been entitled out of the proceeds of said crop; to the payment of which he alleges, he applied the money so received by him. To this the complainant opposes no proof whatever, and under the rule laid down by this court, in the case of Powell v. Powell, 7 Ala. Rep. 582, this is responsive matter, and *prima facie* evidence of the state of accounts between the parties. Such being the case, the complainant is entitled to no decree on this part of his bill.

From what has been said, it is manifest that the decree of the chancellor must be reversed; and as there is nothing in the record to justify us in concluding that a different result would spring from remanding the cause, the bill must be here dismissed, without prejudice, the defendant in error paying the costs of this court, and of the Court of Chancery.

SMYTH *vs.* TANKERSLEY.

1. A contract, by which the owner of land lets it to another, and agrees to receive as compensation, a portion of the specific products, is a letting on shares, although the words usual in leases are used; and a tenancy in common in the products is created.
2. A sale of the entire property in a chattel, by one tenant in common, is a conversion, for which trover may be maintained by his co-tenant.

3. The sale, by an officer, of the entire property in goods owned by two jointly, under an execution against one of them, is an abuse of his legal authority, which renders him liable as a trespasser *ab initio.*
4. And if the wrong doer has sold the property, and received the money, the owner may waive the tort, and bring assumpsit for the money.

ERROR to the Circuit Court of Montgomery.
Tried before the Hon. John D. Phelan.

This was an action of ASSUMPSIT, brought by the plaintiff in error against the defendant in error, under the following circumstances: The plaintiff had made a contract with one David Childers, and two other persons, by which he *rented* to them certain lands, and was to receive one-fourth of all the products, after deducting all expenses for bagging, rope, and hauling the cotton, for the rent. A portion of the cotton made on the land was brought to the city of Montgomery, for sale, and while there was levied on and sold by the defendant in error, as a constable, under executions in his hands against the said Childers. The sale was made after notice that one-fourth of the cotton belonged to the plaintiff in error, and the whole was sold as the property of said Childers. The court charged, that the plaintiff could not sue alone, but must join the other parties in interest with him: to which the defendant excepted, and now assigns the same for error in this court.

WATTS, JUDGE, & JACKSON, for plaintiff in error.

1. The *sale*, by a constable or sheriff, of the entire interest in property belonging to several joint tenants, under an execution against one of them, works a *severance* of the interests, and entitles the others, either jointly or separately, to maintain an action against the officer. Parminter v. Kelly, 18 Ala. Rep. 716, and authorities there cited; Waddell v. Cook, 2 Hill (N. Y.) 49, and Rains v. McNairy, 4 Humph. R. 356; and if the officer has received the *money*, the tort may be waived, and assumpsit maintained. Boyd v. Crown, 17 Ala. Rep. 51.

2. The parties, Smith and Childers, were joint tenants in the *cotton* sold. Putnam v. Wise, 1 Hill (N. Y.), 234, and the authorities there cited, which overrules the authorities cited by defendant's counsel, from N. Y.

3. The case of Parminter v. Kelly, 18 Ala. Rep. 716, is directly in point, to show that the suit may be maintained in the name of *one* of the tenants in common, *alone.* In the state of the facts of that case, it will be seen, that the court refused to charge (as requested by the defendant), that the plaintiff, *suing alone, could not maintain the action*, and this refusal to charge was assigned as error; and this court decided that there was *no error* in the refusal so to charge.

ELMORE & YANCEY, *contra.*

1. The charge of the court, assigned as error, is correct, in the conclusion that the plaintiff could not recover, even if it be granted, that an erroneous reason is given by the court.

The parties were not tenants in common, or joint owners of the crop.

A distinction is drawn, in the books, between a letting of premises on shares, and a renting of land, with a reservation for the payment of rent in produce. Caswell v. Districh, 15 Wendell, 379 ; Stewart v. Doughty, 9 Johns. 107.

The letting of land on shares creates a tenancy in common in the crop raised ; but the renting of land, with an agreement that the rent be paid by a certain proportion of the produce, creates a lease ; and the title to the entire crop is in the tenant, until a division takes place, and the rent is set apart for the landlord. See same authorities ; Putnam v. Wise, 1 Hill, (N. Y.) 243.

But this case has been decided, in principle, upon a similar state of facts. In the case of Dulany v. Dickerson, the landlord was to receive a part of the crop as rent; the tenant sold the crop to B. The landlord sued B. in assumpsit. The court decide, that neither trespass nor assumpsit can be maintained, because he had neither the actual possession nor general or special property in the crop. See Dulany. v Dickerson, 12 Ala. Rep. 603.

If a tenancy was created by the agreement between Smith and Childers, then the title to all products raised on the land was in Childers, and of course the landlord cannot maintain assumpsit. See Thompson v. Mahawny, *et al.* 17 Ala. Rep. 367.

The case of Parminter v. Kelly, 18 Ala. Rep. cited by the

plaintiff in error, is not applicable to this case, because it proceeds on the assumption, that the parties were tenants in common. That is denied to be the case here.

GOLDTHWAITE, J.—The position taken by the counsel for the defendant in error, in this court, renders it necessary to determine the legal effect of the contract between the plaintiff in error and Childers. The terms of this contract are thus stated in the bill of exceptions: "that Smyth rented to the said Childers certain lands, on the following terms, to wit; that said Smyth was to have one-fourth of all the products of said lands, rented as aforesaid, after deducting all expenses for bagging, rope, and hauling the cotton, which was to be in payment and satisfaction of the rent." If this contract was a *lease*, then the whole product of the land rented belonged to the lessee, until the share of the lessor had been separated and delivered. Stewart v. Doughty, 9 John. 108; Thompson v. Mawhinny and Smith, 17 Ala. Rep. 362; while, on the contrary, if it was only a letting of the land *on shares*, then the parties to the agreement were tenants in common of the products to be grown and divided between them. Hare v. Celey, Cro. Eliz. 143; Foote v. Colvin, 3 John. 216; Bradish v. Schenck, 8 ib. 117; De Mott v. Hagarman, 8 Cow. 220; Caswell v. Districh, 15 Wend. 379; Putnam v. Wise, 1 Hill, (N. Y.) 234; Bishop v. Doty, 1 Verm. 37; Chandler v. Thurston, 10 Pick. 205; Walker v. Fitts, 24 Pick. 191; Maverick v. Lewis and Gibbs, 3 McCall, 211.

In the case of Thompson v. Mawhinney and Smith, *supra*, it was decided by this court, that a contract made with the owner of land, which the other party agreed to cultivate, and to divide the products equally with him, was not, technically speaking, a lease, but that a tenancy in common was created in the products. In the contract under consideration, the mode of compensation adopted repels the conclusion, that it could have been the intention of the parties, that the land should not be cultivated, and thus assimilates its terms more closely to the contract in the case last cited. It is true, the phraseology adopted is that which is usual in leases, but the substance of the agreement is to be regarded, rather than the words, Putnam v. Wise, *supra;* and in contracts of this

description, the true test seems to be, that wherever provision is made for dividing the *specific* products of the land, a tenancy in common results. Putnam v. Wise, *supra*, and authorities there cited.

The case of Dulany v. Dickerson, 12 Ala. Rep. 601, to which we have been referred by the counsel for the defendant in error, is not in opposition to these views. The relation of landlord and tenant may exist, notwithstanding the former is, by the terms of the contract, to receive a portion of the crop in payment. If the tenant take an interest in the soil, it is a lease, by whatever words made, and the payment of a specific portion of the crop is then simply a payment of the rent in kind. In the case referred to, the contract is not set out, and the landlord had sued and obtained a judgment against the tenant for the rent. It was treated by all the parties as a lease, and no question was raised upon that point. The judge, the terms of the contract not being before the court, treated it, as the parties had done, as a question involving the relation of landlord and tenant only. It results from these views, that the plaintiff in error, with the other parties to the contract, were owners in common of the cotton.

The charge of the court, that the plaintiff below could not recover, without joining the other owners as plaintiffs, was erroneous. The case of Parminter v. Kelly, 18 Ala. Rep. 716, decides, that if a tenant in common of a chattel sell the entire property, it is a conversion, for which trover may be maintained by his co-tenant; and the law is now well settled, that the sale by an officer, of the entire property, in goods owned by two jointly, on an execution against one of them, is an abuse of his legal authority, which renders him liable as a trespasser *ab initio*, Waddell v. Cook, 2 Hill, 49, note (a), and cases there cited; and if the wrong doer *has sold it, and received the money*, the owner may waive the tort, and bring assumpsit for the money. Upchurch v. Nosworthy, 15 Ala. Rep. 705; Crow v. Boyd's Adm'r, 17 Ala. Rep. 51.

The judgment is reversed, and the cause remanded.

QUARLES *vs.* WALDRON AND WIFE.

1. On grounds of public policy, an attorney at law may be a witness for his client, when he has no other interest in the event of the suit than such as concerns his fees, and they are not contingent in their nature.
2. A demurrer to a declaration cannot properly be said to be a *plea to the merits*, except in cases where a judgment on the demurrer in favor of the defendant would be a bar to a subsequent suit on the same cause of action; and this can never be the case where the declaration is defective only for the want of some necessary averment.
3. In assumpsit by husband and wife jointly, for the use of the wife, when the declaration does not aver that the promise was made to the wife *dum sola*, nor that she was in any way the meritorious cause of action, it is demurrable; but if judgment is rendered by default against the defendant, and afterwards set aside on condition that he shall *plead to the merits*, the condition is not complied with by filing a demurrer, and assigning as cause of demurrer the want of such necessary averments in the declaration.

ERROR to the Circuit Court of Wilcox.

Tried before the Hon. E. Pickens.

This was an action of assumpsit brought by Waldron and wife (for the use of the wife) against the plaintiff in error, for board, &c., furnished to him and his family. The declarations contains only the common counts of *indebitatus assumpsit* and *quantum meruit* for board, &c., furnished plaintiff in error. At the March Term, 1851, there was a judgment by default rendered against the defendant below. This was set aside on his motion, the court annexing the condition that he should plead to the merits.

After this, the defendant demurred to the declaration, assigning as cause of demurrer that the husband and wife had been improperly joined in bringing the action. This demurrer the court overruled, or rather refused to consider, upon the ground that it was not a plea to the merits, and did not fulfil the condition imposed by the court on setting aside the judgment by default.

An objection was made to the testimony of Mr. Sellers, who was attorney for the plaintiffs below, on the ground of interest. There was no proof that he had any interest in the event of the cause, other than as an attorney for his fees,

which were not shown to be contingent. He replied, in answer to a question to that point, that if plaintiff succeeded he would probably get his fees, and if he did not succeed that he probably would get nothing, as plaintiff was indigent.

The court overruled the objection to his competency as a witness.

The overruling the demurrer and the admission of the testimony of Sellers are assigned for error.

WATTS, JUDGE & JACKSON, for plaintiff in error.

1. The demurrer to the declaration should have been sustained. To authorize the husband and wife to maintain an action in their joint names, the declaration must show either a promise made to the wife whilst *sole*, or that she is the meritorious cause of the action in some other way. See Chitty's Pl. 202, top page, and 30, 31 marginal page.

2. A demurrer is a plea to the merits. See Perkins v. Moore, 16 Ala. 17, and the authorities there cited.

3. The witness Sellers was interested in the event of the suit. See Carter and others v. Mundy, 12 Ala. 132.

C. C SELLERS, *contra.*

PHELAN, J.—On the question of the competency of Mr. Sellers as a witness for plaintiffs below, the cases of McGehee v. Hansell, 13 Ala. 17, and Morrow *et al. v.* Parkman *et al.*, 14 Ala. 769, are conclusive. On grounds of public policy, an attorney may be examined as a witness for his client in a cause in which he is employed, if he has no other interest in the event of the suit than such as concerns his fees, when these are not contingent.

Was the demurrer of the defendant below a *plea to the merits*, within the terms of the condition imposed by the court on setting aside the judgment by default?

A plea to the merits is one that goes to the substance of the action, and if successful will bar any future action founded upon the same cause of action. Had the declaration in this case shown, by proper averments, that the contract for board, &c., was made by defendant with the wife *dum sola,* or that she was in any way the meritorious cause of action, the

demurrer must have been overruled. And had judgment been given for the defendant in this action on the demurrer, and plaintiffs had brought another action, and fileda declaration containing the averments, which were wanting in this to make it good, the judgment on the demurrer, in this action, would have been no bar to a recovery in such subsequent action. This test will sufficiently show, that the demurrer in this case was not a plea to the merits, and therefore the court properly rejected it, under the conditions imposed on the defendant in setting aside the judgment by default, that he should plead to the merits. In support of the principles above stated, see Gould P. 478; 1 Chitty P. 198; Perkins v. Moore, 16 Ala. 17.

Ther is no error in the record, and the judgment below is affirmed.

BRUCE, ADMR. *vs.* BARNES.

1. A motion to enter satisfaction of a judgment and a petition for a *supersedeas* are substitutes for the ancient writ of *audita querela;* and consequently, all issues of fact and matters *in pais* must be tried in the same manner as if the proceeding had been commenced by that writ.
2. On the trial of a motion to enter satisfaction of a judgment, the plaintiff has the right to demand a trial by jury, and to cross-examine all witnesses whose testimony is offered against him to prove the fact of payment.

ERROR to the Circuit Court of Marengo.

Tried before the Hon. John D. Phelan.

BROOKS & BYRD, for plaintiff in error.

A. R. MANNING, *contra.*

Upon the first point, that the trial ought to be by jury; the question is settled the other way, upon principle and authority, by the cases of Moore & Magee v. The Mobile Cotton Press, 9 Por. 679; Lockhart v. McElroy, 4 Ala. 572; Chandler v. Faulkner, 5 Ala. 567; Faulkner v. Chandler, 11 Ala. 725. This is no infringement of the constitutional clause that the "trial by jury shall *remain* inviolate."

If a party against whom a judgment upon verdict had been rendered, was entitled of right to a trial by jury, upon alleging payment after the last proceedings had, and the court had no power to prevent such a course, a cause might be kept pending *ad libitum.*

The bill of exceptions says, the plaintiff in the judgment insisted on a right of "trial by jury, AND a cross-examination of the witnesses." This means a cross examination in court, before the jury. He did not object in the court below that he *had no notice* of the time and place of taking the affidavits, but that the witnesses should be examined orally in court, and he be permitted to cross-examine them before the jury.

This also is the meaning of the bill of exceptions, which is to be taken most strongly against plaintiff in error.

And this is not affected by its being said, that the trial was upon "*ex parte* affidavits;" for, says Judge Bouvier, in Law Dictionary 534, "*Ex parte* of the one part. Many things may be done *ex parte* when the opposite *party has had notice.* An affidavit or deposition is said to be taken *ex parte*, when only one of the parties *attends* to taking the same." 1 Bouvier Law Dic. 534.

DARGAN, C. J.—At the Fall Term of the Circuit Court of Marengo, A. D. 1845, a judgment was rendered against the defendant, Barnes, in favor of the administrator of John F. Barnes, deceased, for the sum of four hundred and forty-nine dollars 28-100, and at a term subsequent to the rendition of the judgment the defendant moved the court to have satisfaction thereof entered of record. Notice of the motion having been served on the administrator, he appeared and resisted it. The defendant in the judgment offered, as evidence of its payment, the *ex parte* affidavits of witnesses, but by whom they were made does not appear. The administrator insisted upon the right of trial by jury, and also on his right to cross-examine the witnesses, but the court ruled that the proper mode of trial was by the court alone, and on *ex parte* affidavits. To this ruling of the court the plaintiff in error excepted.

The counsel for the defendant in error contends that the ruling of the Circuit Court is sanctioned by several decisions

of this court. In the case of Lockhart v. McElroy, 4 Ala. 572, the execution had been superseded in vacation, upon the petition of the defendant showing that the judgment had been satisfied; and when the cause came on to be heard, the plaintiff in the judgment admitted the facts contained in the petition to be true, and of course nothing remained to be done but to pronounce the judgment of law arising on the facts thus admitted. The case of Chandler v. Faulkner et al., 5 Ala. 567, was this, the defendants in the judgment filed a bill in equity alleging satisfaction thereof. The bill was dismissed on the ground that the parties had a full and complete remedy at law.

It is very clear that neither of these cases sustains, in the slightest degree, the ruling of the Circuit Court in the case before us. They establish, it is true, that the court from which the execution issued may supersede it, and enter satisfaction of the judgment on the ground of payment; but they decide nothing as to the mode of trying the fact of payment, when that fact is contested. The last case referred to again came before this court, and is reported in 11 Ala. 725. There the proceeding was commenced by motion to have satisfaction entered of record, and the defendant in the judgment filed his affidavit, alleging the facts that constituted the satisfaction. These facts were not denied by the oath of the plaintiff, nor does it appear that he made any objection to the trial of the facts by the court. This court held that the affidavit of the defendant, as it was not denied by the oath of the plaintiff, was sufficient evidence to authorize the court to enter satisfaction of the judgment. If it could be admitted that this case is a correct exposition of the law, which, however, I do not admit, still it does not go far enough to sustain the ruling of the Circuit Court in the case before us, for here there was no affidavit of the defendant, and the plaintiff in the judgment expressly objected to the *ex parte* affidavits as evidence, and claimed a trial by jury.

In the case of Bower et al. v. Saltmarsh, decided at the last term, the proceeding was commenced by a petition for a *supersedeas*, and issues of fact were made up, and on the trial the question was, whether the affidavits of the defendants, and of a witness not a party thereto, could be received as evi-

dence. We held that they could not. On several occasions we have held, that a *supersedeas* was a substitute for the obsolete writ of *audita querela*, in which the plaintiff in the writ had regularly to declare, and the defendant to plead, but that with us the petition for the *supersedeas* might be received as the declaration upon this ancient writ, and that the plaintiff in the judgment must either plead or demur to the petition, as he might see proper, and thus make up the issues, either of law or of fact. See 16 Ala. 813, Edwards v. Lewis, and cases there cited. And we think it clear that, if issues of fact are thus made up upon a petition for a *supersedeas*, the parties, or either of them, have the right to have such issues tried by a jury, in the same manner as if the suit was commenced by an ordinary writ. They have the right to claim a trial by jury, to ascertain any fact *in pais* that would satisfy the judgment, and the rules of evidence governing the trial of such issues must be the same as those which govern in other cases. I do not intend to say, that the parties may not submit their issues, either of law or fact, to the court alone for trial. We only intend to say, that if an issue of fact is presented, either party has the right to demand its trial by jury, unless it can be tried by the record, and if witnesses be introduced to sustain the issue by either party, the other has the unquestionable right to cross-examine such witnesses.

Now, the motion to enter satisfaction of a judgment, when no *supersedeas* has been granted or prayed, is still the same thing, to-wit: the substitute for the writ of *audita querela*, and the same practice must govern on the trial of such a motion as would govern if the proceedings had been commenced by a petition for a *supersedeas*. The petition and *supersedeas* are merely intended to arrest the execution until it is ascertained whether it has been properly or improperly issued, and if the allegation in the petition be that the judgment has been paid, the precise same question is presented, whether it be brought forward by way of a petition for a *supersedeas*, or by motion to have the judgment satisfied, and should be tried in the same manner, whether brought forward in the one mode or the other. We therefore hold, that the plaintiff in the judgment had the right to a trial by jury, and also the right to cross-examine all witnesses whose testimony was offered as evidence to es-

tablish the fact of payment. It is not, however, to be understood that we intend to trench upon those decisions which hold that the court can examine into the acts of its own officers upon *ex parte* affidavits. The case before us does not require that we should do so, in coming to the conclusion that the court erred. We intend merely to hold, that a motion to enter satisfaction of a judgment, or a trial upon a petition for a *supersedeas*, is a substitute for the ancient writ of *audita querela*, and consequently all issues of fact or matters *in pais* must be tried in the same mode as if the proceeding had been commenced by that writ.

Let the judgment be reversed, and the cause remanded.

STODDER, EXECUTOR, *vs.* CARDWELL.

1. An accommodation endorser of a bill of exchange is not entitled to a summary judgment, on motion against his principal, under the act of 1821, (Clay's Digest, 531, § 3.)

ERROR to the Circuit Court of Tuskaloosa.

Tried before the Hon. John D. Phelan.

This was a motion for a summary judgment by Cardwell against the plaintiff in error, as executor of James J. Foster, deceased. The notice alleged that Cardwell endorsed a certain bill of exchange, which is particularly described, for the accommodation of said Foster, the drawer; that judgment was afterwards rendered against him on said endorsement, and execution issued thereon, and that he had been compelled to pay the amount of said execution to the sheriff. Judgment by default was rendered against the plaintiff in error, to reverse which he prosecutes this writ of error.

P. & J. L. MARTIN, for plaintiff in error.
MOODY, *contra.*

CHILTON, J.—The only question which is presented by this record is, whether one who endorses a bill for the accom-

modation of the drawer, and who has been compelled to pay the same by suit, is a security within the meaning of the first section of the act of 1821, so as to be entitled to the summary remedy which the law provides for sureties. The section referred to reads as follows: "In all cases where judgment shall be entered up in any court of record, or by any justice of the peace, against any person or persons as security or securities, their executors or administrators, upon any note, bill, bond or obligation, and in all cases where execution shall be awarded by, or issued from any of the courts of record, or any justice of the peace, against any person or persons as security or securities, his, her, or their heirs, executors, or administrators, upon any bond, obligation, or recognizance, and the amount of such judgment or obligation, or any part thereof, hath been paid or discharged by such security or securities, his, her, or their heirs, executors, or administrators, it shall be lawful for such security or securities, his, her, or their heirs, executors, or administrators, to obtain judgment by motion against such principal obligor or obligors, recognizor or recognizors, his, her, or their heirs, executors, or administrators, in any court, or before any justice of the peace, where such judgment may have been entered up, and execution awarded against such security or securities, his, her, or their heirs, executors or administrators, for the full amount which may have been paid, with interest thereon from the time the same shall have been paid and satisfied, until such judgment shall be discharged." Clay's Digest, p. 531, § 3.

Upon comparing this section of the statute with the succeeding sections, in which the same language occurs, we think it is exceedingly clear that by the term "security or securities upon any note, bill, bond," &c. the Legislature did not intend to embrace endorsers, whether they became such for value, or for the accommodation of the drawer. It is proper to remark, that there is nothing in the succeeding sections indicating an intention to apply a different meaning to these terms, from that which should be given to them in the first. Assuming, then, for the sake of the illustration, that the first section embraces endorsers, they would, in cases where there were two or more, under the second section, have the right as between themselves, to a summary judgment, on motion

for contribution; but this court has repeatedly held, that in the absence of an agreement, either express or implied, to share the loss, the parties are bound as their names appear on the bill. Branham & Atwood v. Ragland, 3 Stew. R. 247; Spence v. Barclay, 8 Ala. Rep. 581. Upon the same assumption, under the third section, the accommodation acceptor could be united in one suit with the drawer, who has the right, under this section, to come in and be made a party, when the "security upon the bill" is sued, &c. and thus two judgments must be rendered, or the acceptor charged with the damages. Again: the fourth section would clearly establish the right of contribution between every description of endorser, since by it "the security or securities upon the note, bill," &c. when sued may, on motion, cause a judgment to be entered against *all* the parties to the instrument, for their respective shares or proportions of the damages; and by the fifth section, the endorser could obtain his discharge if the creditor or holder failed to sue upon the instrument after being required in writing to sue. But it has been expressly held by our predecessors, after a careful collation of these several sections, that the statute confers no such right upon the endorser, and that although he be but an accommodation endorser, he is not a security within the meaning of this section. Bates v. The Branch Bank Mobile, 2 Ala. Rep. 689.

Having shown that the construction contended for would reach far beyond the manifest intention of the Legislature, which was to give a more simple and summary remedy to the surety than he previously possessed, and that it would establish an entirely new rule as it respects the extent of the liability of endorsers as between themselves; and further, that it would introduce anomalies in pleading, productive of the greatest confusion, we hence conclude that the Legislature never intended this construction to be placed upon the statute, but when they spoke of security or securities upon a note or *bill*, by the term bill they meant bill single, or, if a bill of exchange, cases where several parties unite in drawing for the accommodation of one of them.

But it is said this is a remedial statute, and should be liberally construed. If we grant this, we must nevertheless endeavor to arrive at its true spirit and meaning, and reject a

construction which would introduce such perplexities and embarrassments in pleading as would render its administration almost, if not quite, impracticable.

It is supposed that the case of Meek & Co. v. Black et al. 4 S. & P. 374, is opposed to the view here taken. When the facts are considered on which that decision was based, we do not think that it is necessarily so. Be this as it may, so far as that case countenances the doctrine of contribution between accommodation endorsers, in the absence of an agreement to contribute, it stands alone, and opposed to all authority, and must be considered as an incorrect exposition of the law.

After the best examination I have been enabled to give this case, I am satisfied the learned judge mistook the law, and in this opinion my brethren all concur.

The judgment must be reversed, and as the plaintiff below cannot proceed in this summary way, the cause will not be remanded.

KIRKLEY *vs.* SEGAR ET AL.

1. Where several persons join as plaintiffs in an action of assumpsit, and the plea is *non assumpsit*, evidence tending to show that the plaintiffs have a right to sue jointly, should not be excluded from the jury.
2. When assumpsit is brought in the Circuit Court for a sum *exceeding fifty dollars*, it is not error to allow testimony to go to the jury proving an indebtedness of *less than fifty dollars*; nor is it erroneous for the court to charge the jury, that if they believe such proof, they can find for the plaintiff.
3. In such a case, if the jury return a verdict for a less sum than fifty dollars, the plaintiff, on making the affidavit required by the statute, (Clay's Digest, 325, § 75,) will be entitled to judgment for the amount of the verdict with costs.

ERROR to the Circuit Court of Russell.

Trid before the Hon. John J. Woodward.

J. J. Segar and two others brought an action of assumpsit in the Circuit Court of Russell, against the plaintiff in error to recover sixty dollars, the price of a gin. The declaration contains a count on a special agreement between the parties

for the sale of the gin, in which it is averred that the defendant agreed to purchase the gin at sixty dollars, or to re-deliver it to the plaintiffs in a reasonable time, and that he has never re-delivered it, or paid for it, though often requested so to do. It also contains counts for goods, wares and merchandize sold and delivered; for work and labor done; for money lent; for money paid, laid out and expended; for money received to plaintiff's use, and on an account stated.

No pleas appear in the record, but the judgment entry recites that a jury was sworn to try the issue joined.

On the trial, as appears by the bill of exceptions, the plaintiffs below proved that the defendant acknowledged that he, with the plaintiffs, had levied an attachment on the property of an absconding debtor; that they had resolved to make it pay their several debts; that the defendant was to take the gin at an agreed price; and under this arrangement, if the plaintiffs recovered of him, he would only have twenty-four dollars to pay for the gin. This was all the proof of the joint interest of the plaintiffs, and the defendant moved the court to exclude it from the jury, which was refused, and the refusal excepted to. The court was requested to charge the jury, that if the facts were as proved by the witness, yet it furnished no evidence that the plaintiffs were jointly interested. This also was refused, and excepted to by defendant. There was proof offered also showing the contract in relation to the gin to have been this: that the defendant was to take the gin and try it, and if he liked it to keep it, otherwise to return it; and if he kept it he was to pay for it twenty-four dollars in cash, and thirty-six dollars in a proved account on a certain man named. The court charged the jury, that the proof was admissible under the declaration, and that if they believed it they could find for the plaintiffs, provided they believed from the testimony, that the defendant had not returned or tendered back the gin in a reasonable time. This charge was also excepted to by the defendant.

The jury rendered a verdict for the plaintiffs for twenty-six $\frac{40}{100}$ dollars, and on the plaintiffs making oath that they were entitled and ought to have recovered sixty dollars, the court rendered judgment for the amount of the verdict, and costs against the defendant.

The matters in the bill of exceptions, and the rendition of judgment on the verdict, are here assigned for error.

HOOPER, for plaintiff in error.
BELSER & HARRIS, *contra.*

LIGON, J.—It was clearly proper to let the testimony first objected to by the plaintiff in error, go to the jury, for the purpose of establishing the joint interest of the defendants in error; for we must suppose that the plea of *non assumpsit* was interposed, and formed the issue submitted to them. Under this plea, any testimony which tended to prove the joint interest of the plaintiffs, in the court below, in the cause of action, and consequently their right to sue jointly, was proper evidence to go to the jury to be weighed by them. The facts deposed to by the witness had this tendency, and his testimony was rightly admitted.

The charge asked for by the plaintiff in error, in connection with this proof, was correctly refused, for had it been given, the court would have invaded the province of the jury, by assuming to judge of the weight of the testimony offered.

We see no error, detrimental to the plaintiff in error, in the last charge given by the court. No objection had been made to the admission of the evidence, on which the first part of it is founded, and as it tended to prove an indebtedness on the part of the defendant, it was, therefore, no error for the court to tell the jury that, if they believed the evidence, they *could* find for the plaintiff. The latter part of the charge is abstract, but if any effect could be given to it, it would be favorable to the plaintiff in error, and he cannot be heard to complain of it.

The jury rendered a verdict in favor of the plaintiffs below, for a sum less than fifty dollars, and judgment was given for this sum, with costs. This is here assigned for error. On inspecting the record, we perceive the judgment entry shows that the affidavit required by the statute to entitle the plaintiff to his judgment, when the sum found by the jury will not support the jurisdiction of the court, has been made in this case.

There is no error in the record, and the judgment must be affirmed.

VAUGHAN *vs.* ROBINSON.

1. In appeal cases the defendant may waive all objections to the mode in which he is brought into court, and submit the case, although involving more than fifty dollars, to the decision of the Circuit Court, which, by virtue of its general jurisdiction over the amount, can determine it.
2. And by failing to plead in abatement in the Circuit Court, the want of jurisdiction before the justice, the defendant waives all objection on that ground.

ERROR to the Circuit Court of Lowndes.

Tried before the Hon. Robt. Dougherty.

Vaughan sued Robinson before a justice of the peace, and judgment was rendered for the defendant, from which he appealed to the Circuit Court, and there filed his statement for forty-five dollars, to which Robinson pleaded non assumpsit. The evidence conduced to show that more than fifty dollars was due at the time of trial, and that more than that amount was due when the suit was commenced before the justice, and that no portion of the same had been paid or remitted. The court charged, that if more than fifty dollars was due when the suit was commenced before the justice, and no portion of the same had been paid or remitted, the jury must find for the defendant. The charge of the court is assigned for error.

COX, for plaintiff in error.

GEO. W. STONE, *contra.*

GOLDTHWAITE, J.—It is certainly true, that the jurisdiction of a justice of the peace in civil cases is limited to amounts not exceeding fifty dollars, and that a judgment rendered by that officer for over that amount, would be *coram non judice*, and void; yet when the case is removed into the Circuit Court, and is there pending, it is competent for the parties to treat it as if originating in that court; and if they do so, a judgment rendered for an amount exceeding fifty dollars, would be held good, by virtue of the general jurisdiction of that court. The defendant can, however, on the appeal, avail himself of the want of jurisdiction in the justice, by bringing it to the notice of the Circuit Court, by plea in

abatement, and if he does not do this, he waives all objection resulting from the mode in which he is brought into that court. This principle was decided in the case of Bentley et al. v. Wright, 3 Ala. Rep. 607, and recognized in Hart v. Turk, 15 Ala. Rep. 675, and Rose v. Thompson, 17 Ala. Rep. 628, and we see no good reason for departing from the rule. The rule admitted, it follows that the court below erred in its charge.

The judgment is reversed and the cause remanded.

BOYKIN, McRAE, & FOSTER *vs.* COLLINS.

1. In assumpsit, for goods, wares, and merchandize sold and delivered, parol evidence is inadmissible, to prove that the goods were shipped and forwarded to the defendant, by her *written instructions*, unless the writing itself is produced, or its absence satisfactorily accounted for.
2. The objection to its admissibility may be raised for the first time, when the evidence is offered on the trial, although the deposition of the witness, taken upon interrogatories and cross-interrogatories, was in the possession of the defendant's counsel, for twenty-four hours before the trial, and no notice was given to the plaintiffs, to produce the writing.
3. As a general rule, if a party is present at the taking of a deposition, and allows secondary evidence to be received, without objection, he will not be allowed to raise the objection afterwards.

ERROR to the Circuit Court of Lowndes.

Tried before the Hon. Robert Dougherty.

This was an action of ASSUMPSIT, by Boykin, McRae, & Foster, against Mrs. Louisa Collins, for goods, wares, and merchandize sold and delivered. The declaration contained the common counts. On the trial, the plaintiffs read the deposition of one Helen, who was a clerk in their house in Mobile at the time the account was contracted on which the suit was founded. This deposition was taken on interrogatories and cross-interrogatories.

In answer to plaintiffs' third interrogatory, the witness says: "I know that the two bills of merchandize were shipped to Mrs. Louisa Collins, by her written instructions, and that

said goods went on board of the boats, and a bill of lading for each lot was taken by myself."

When this deposition was offered in evidence on the trial, the defendant's counsel moved the court to exclude from the jury all that part of the testimony which speaks of written instructions from Mrs. Collins to send her goods, upon the ground, that it appeared, if any such instructions or orders were given, they were in writing, and the writing ought to be produced, or its absence accounted for. The written order was not produced in court, nor was its absence accounted for; but the plaintiff proved that said deposition had been in the possession of the defendant's counsel for twenty-four hours before the trial, and that he had given plaintiffs' counsel no notice to produce said written order. The court excluded that portion of the deposition which was objected to, and the plaintiffs excepted.

The plaintiffs requested the court to charge the jury:

1. That to authorize the defendant to require the production of said written order or letter, the defendant should have objected to the witness speaking in relation thereto at the time the deposition was taken, or by suitable cross-interrogatories, and that having neglected to do so, she cannot now object to the deposition on that account;

2. That in order to sustain this action it was not necessary for the plaintiffs to produce said writing or letter referred to, without notice from the defendant of her intention to require it;

3. That if defendant's counsel had been in possession of the deposition for twenty-four hours, and had given no notice to plaintiffs of their intention to require the production of said writing, that defendant cannot require the same after both parties have announced themselves ready for trial, and the said testimony is offered to the jury.

The court refused each one of these charges, and the plaintiffs excepted to each refusal. The exclusion of the evidence, and the refusal to charge as requested, are assigned for error.

Campbell & Bird, for plaintiffs in error.

1. The letter being a collateral paper, and not sued on in this case, it is not necessary for it to be produced without

notice to that effect. Planters' & Merchant's Bank v. Borland, 5 Ala. Rep. 531, § 3 note 5.

2. Defendant's counsel should have given the earliest notice of his intention to make the objection to the deposition. Spence v. Mitchell, 9 Ala. Rep. 744.

3. The defendant having written the letter, is of course as much supposed to know of its existence as the plaintiffs, and consequently could have filed suitable interrogatories to witness.

4. It is too late to make the objection after the parties have gone to the jury. Spence v. Mitchell, 9 Ala. Rep. 748; Olds v. Powell, 10 Ala. Rep. 393.

5. As witness was examined by interrogatories, that was the time to make the objections, as it was the only means to enable the witness to produce the paper, or account for its loss, nei her of which he was required to do.

George W. Stone, *contra.*

1. The letter, being the highest and best evidence, should have been produced; and it was not incumbent on the defendant to give plaintiffs notice to do so. As well might it be contended that a plaintiff need not produce the note he declares on, without notice requiring it. 18 Ala. Rep. 479; ib. 214; ib. 388; 16 ib. 116.

2. If the letter had been produced, the court, on motion, would have been bound to exclude it, because the hand writing was not proven. The witness did not know Mrs. Collins, and could not know her hand writing. He does not say he knew it, and the court cannot presume he did. 1 Greenleaf's Ev. §§ 577–578.

3. It will be observed, that in this case the objection is, that defendant did not notify plaintiffs *to produce the letter;* not, that we did not notify them of our intention to move to suppress that part of the deposition. We know of no rule of law requiring a party to notify his adversary that inferior evidence will not be received. All men are presumed to know the law; the counsel in this case did know it.

PHELAN, J.—We hold it to be entirely clear, that the portion of Mr. Helen's deposition which says that the mer-

chandize had been shipped to Mrs. Collins by her instructions, was testimony a together material to the issue between the parties to this action. But it is shown here by the deposition itself, that these instructions were *in writing*. A well settled rule of the law of evidence declares, that where there is any writing containing evidence material to the issue in the possession of a party, such party cannot substitute oral testimony in place of the written, unless he will account satisfactorily for the absence of the written evidence. 1 Green. Ev. § 88.

This was an attempt to substitute *secondary* evidence for *primary*, without showing that the primary or best evidence could not be had. *Secondary* evidence, without such a showing, is not *admissible*, and a motion to suppress it in a deposition may be made at any time, either at the trial or before. The principle is not varied in the case of a deposition, from what it would be if the same testimony were given by a witness from the stand. In either case, *secondary* evidence will be rejected, when it is shown that the party offering it had better evidence which he does not produce, and shows no sufficient reason why he does not produce it.

The plaintiffs, by proving that the defendant had had possession of the deposition for twenty-four hours before the trial, and by the charges that the court was requested to give in connection with that proof, seem to have thought that the legal obligation resting upon them, to lay a proper ground for the introduction of secondary evidence, was obviated by the neglect of the defendant to give them notice to produce the written order, after having had twenty four hours' possession of the deposition. That would be giving a qualification to the rule requiring the production of the best evidence, that would be both novel and dangerous. The rule now is, if a party allows secondary evidence to go to the jury without objection, he will not be allowed to object in the argument; but by this new rule, if a party knows it is the intention of the other party to offer secondary evidence, and he does not give him notice to produce the best, he will be concluded from objecting to the secondary evidence when it is offered. This would not be a wholesome rule, and in truth is not the rule. All the charges that were asked of the court,

which were predicated upon such an idea, were properly refused.

There is one of the charges that the court refused, which requires, perhaps, a separate notice. The request is in these words;

"That in order to require the production of said paper, letter, or order in writing, the defendant should have objected to the witness' speaking in relation thereto at the time of the deposition being taken, or by suitable interrogatories, and that having then neglected so to do, she cannot now object to the deposition of the witness on that account."

If a party is present at the taking of a deposition, and allows *secondary* evidence to be received without objection, he would not be allowed, as a general rule, to make the objection afterwards; but in this case the deposition was taken by interrogataries, and there is no proof that the defendant was present by herself or counsel. But, it is said, the objection should have been made by "suitable cross-interrogatories." The answer is, that there was nothing in the nature of the suit, or the interrogatories filed by the plaintiff, that would naturally suggest to the mind of the defendant, that plaintiff was going to establish his demand by proof of *written instructions* from defendant to forward goods. There was no question by plaintiffs, so framed as to elicit from the witness proof that the goods were *furnished agreeably to instructions* from the defendant of any kind, by which defendant could be admonished to call for the production of a writing in a cross-interrogatory. A motion to suppress testimony which is wholly incompetent may be made at the trial, but testimony which is good in itself, but has been irregularly taken, ought not to be suppressed, unless the motion is made before the parties proceed to trial. Jordan v. Jordan, 17 Ala. Rep. 466, and authorities there cited.

There is no error in the record, and the judgment is affirmed.

BOSWELL *vs.* MORTON.

1. When two persons sign their names to the blank form at the bottom of a writ acknowledging themselves security for the costs of suit, their contract is joint only, and not joint and several, either at common law or under the statute of this State.
2. But when suit is instituted against one of them on their joint contract, he can only take advantage of the non-joinder of the other by plea in abatement.
3. And when a motion is made for a summary judgment against one for the costs of the suit, and he does not interpose any objection on account of the non-joinder of the other, as a defence, he will be held to have waived it.
4. A motion for a summary judgment against a security for the costs of suit may be made before the costs are taxed; and it is sufficiently certain by showing that it is for cost, without setting out the amount or items of cost.

ERROR to the Circuit Court of Fayette.

Tried before the Hon. Wm. R. Smith.

E. W. PECK, for plaintiff in error.

P. & J. L. MARTIN, *contra.*

DARGAN, C. J.—Gustavus Boswell moved the Circuit Court of Fayette for judgment against James B. Morton to recover of him the cost of a suit that had been commenced by William Morton against said Boswell, and which had been decided against the plaintiff, William Morton. In the motion it is alleged that James B. Morton was the security for the costs of said suit; and on the trial, the plaintiff read in evidence, in support of the motion, the following endorsement on the back of the writ: "We acknowledge ourselves security for the cost in this case," which was signed, James B. Morton, M. D. Foster. He then produced the judgment, by which he was adjudged to recover his cost, and also an execution issued thereon, against the plaintiff in the original suit, which had been returned *nulla bona.* The court refused the motion, and the cause is brought here by writ of error.

As the motion was refused, and the record does not show the special ground of refusal, we must consider the whole case as made by the proof; for if there could be found one sufficient reason why the judgment should not have been rendered, then we cannot reverse. It is very clear that the con-

tract, by which the defendant became bound for the cost, is not one which is joint and several by the common law; and it is equally clear that it is not made so by our statute, for it is neither a bond, covenant, bill, promissory note, nor a judgment, and these are the only contracts which, being joint by the common law, are made joint and several by our statute. Clay's Dig. 323. The contract is therefore joint only, and not joint and several; and the first question is, can this summary proceeding be allowed on a joint contract against one of the joint contracting parties, without showing a reason why the plaintiff does not proceed against both. If suit had been brought on this contract in the usual manner, the defendant could have availed himself of the defence of the non-joinder of his co-security by plea in abatement alone; and we think this defence should have been interposed in some manner as a defence, although the proceeding is by motion. Indeed, if we hold that the motion could be sustained against one by showing that no judgment could be rendered against the other, we then admit the jurisdiction of the court to proceed against one only; and if the court has jurisdiction to proceed in this summary manner, but there is a defence which will abate or quash the motion, it should have been made by the defendant. He was present in court, and made no objection, so far as we can discover, because of the non-joinder of Foster; and therefore we must consider that none could have been made; or if it could, that it was waived by the defendant.

The next objection to the motion is, that it does not specify the amount of cost sought to be recovered; but we think this is unnecessary. It is true that the judgment, when rendered against a security for cost, must show the amount. See Martin v Avery, 8 Ala. 430; Barton v. McKinny, 3 Stew. & Por. 274; but the motion itself may be made even before the cost is taxed, and is sufficiently certain by showing that it is for cost, without setting out the amount or the items of cost. It is however contended, that the evidence in the court below did not show the amount of cost But it appeared that an execution for the cost had been issued against the plaintiff in the original suit, which had been returned *nulla bona;* and we know that it is the duty of the clerk to tax the cost, and

the execution must show the amount. This we apprehend was done in this case; indeed, we could draw no other inference or conclusion, unless the record contained something to repel such an inference.

It is true, that no inference can be drawn in support of the jurisdiction of the court, when proceeding in this summary manner; but when the question is merely one of evidence as to the amount of the plaintiff's demand, we must weigh it, and draw all just inferences from it, in the same manner that we would had the suit been commenced by ordinary writ.

The authorities to which we have referred show, that the form of the contract by which the security binds himself to pay the cost is immaterial. Upon the whole, we can see no good reason why the motion was not granted; and the judgment must be reversed and the cause remanded.

HARDY *vs.* TONEY.

1. A child born of a female slave, after the making of the testator's will, but before his death, does not pass under the will to the legatee to whom its mother is bequeathed, but goes to the executor as property unbequeathed.

ERROR to the Circuit Court of Lowndes.

Tried before the Hon. Robert Dougherty.

This was an action of detinue, brought by John T. Toney against the plaintiff in error, to recover a slave named Amelia. The evidence showed that Thomas Hamilton, deceased, bequeathed by his will to his widow, Temperance Hamilton, during her life, a slave named Kissiah, and five other slaves, all of which were to be divided at her death among the testator's children and grand-children; that the slave sued for was a child of Kissiah's, and was born after the making of the will, but before the testator's death, and was in his possession at the time of his death; after the testator's death, one Sherwood H. Toney obtained letters of administration on his estate, and applied to the Orphans' Court for an order of sale of

the personal property not bequeathed; the order was granted, and the sale made; that the slave sued for was sold, and purchased by the widow for five dollars. The plaintiff also introduced a deed of gift from Mrs. Hamilton, the testator's widow, by which she conveyed the slave to the plaintiff as trustee for his wife, "Elizabeth Toney, and the lawful heirs of her body." It was shown by parol that the slave remained with Mrs. Hamilton during her life. The defendant objected to the admission of the deed, because it was not proved or acknowledged in open court. The court overruled the objection, and admitted the deed, and defendant excepted. The plaintiff also proved the value of the slave, and of her hire, and that she was in defendant's possession when the suit was brought. This was all the evidence. The court charged the jury that the slave in controversy did not pass under the will to Mrs. Hamilton for life, but that said Hamilton died intestate as to the slave; to which charge defendant excepted. The admission of the deed and the charge of the court are assigned for error.

Bolling, for plaintiff in error.

Geo. W. Stone, *contra.*

CHILTON, J.—The only question in this case is, whether a child, born of a slave bequeathed between the time of making the will and the testator's death, goes with the mother to the legatee, or passes to the executor as property not bequeathed.

The general rule most unquestionably is, that the will takes effect from the death of the testator, and in the absence of words showing a contrary intention, must be construed as if made at that time. Lomax on Exrs. vol. 2, 152–3, and cases cited on the brief. A construction, therefore, which would make it relate back to a period anterior to the time when it takes effect, so as to pass property not named in it, cannot be indulged in this case, there being no expression of the testator which authorizes it. The Circuit Court very properly held that the child did not pass to the legatee.

Let the judgment be affirmed.

ANDERSON *vs.* RICE, ADMRX., &c.

1. When a writ and declaration proceed against the defendant as administratrix, and all the counts are so drawn as to charge her in her representative character alone, proof of a demand against her individually will not support the declaration.
2. When an overseer, by agreement with his employer, is to receive a certain portion of the crop raised, as compensation for his services, he cannot recover in assumpsit for work and labor done.
3. But when the entire crop is received by the employer's administratrix and sold, the overseer may bring his action of trover against her individually, or may waive the tort, and sue in assumpsit for money had and received to his use.

ERROR to the Circuit Court of Talladega.

Tried before the Hon. Robert Dougherty.

The plaintiff sued the defendant as administratrix, in assumpsit. The declaration contains seven counts. In the first three, which are for work and labor done, for goods, wares and merchandize sold and delivered, and for money paid, laid out and expended, it is averred that these several things were done at the special instance and request of John S. Rice, the intestate, in his lifetime, and that he promised to pay, &c., and that defendant, his administratrix, since his death, promised to pay, &c., but neither has paid. The next three are identical with the first, except that the promise to pay is averred to have been made by the administratrix after the death of the intestate. The seventh count is *insimul computasset* against the administratrix in her representative capacity. There is no count on any special contract, nor any for money had and received.

The defendant demurred to each count of the declaration; and pleaded non-assumpsit, payment, and set off, in short by consent. The demurrers were overruled by the court, and the parties went to trial on the pleas.

The plaintiff introduced one Thomason as a witness, who deposed, that in the fall of 1847 the defendant's intestate told witness that plaintiff and intestate were cropping together that year, on a place called the Herrald place; that intestate

was to give plaintiff one-fifth of the crop raised; that twenty-one bales of cotton, weighing four hundred and twenty-five pound each, were raised that year on the place; that cotton was worth from five to six cents per pound in the fall of 1847 and spring of 1848; that intestate died in the fall of 1847; that the twenty-one bags of cotton, before mentioned, were carried by witness to Wetumpka, at the instance of John W. Rice, agent for the defendant, who was then administratrix of intestate; and the whole cotton was there sold by said John W. Rice, as the agent of the defendant, contrary to the wishes of the plaintiff.

On this proof, the court charged the jury that, "if they believed, from the evidence, that the defendant, after the death of the intestate, and while acting as administratrix, either by herself or agent, took the control of, and sold the twenty-one bags of cotton, raised by the plaintiff and intestate, that she would not be liable in her representative character." To this charge the plaintiff excepted; and asked the court to charge the jury, that if they believed, from the evidence, that the defendant, by herself or agent, sold the twenty-one bags of cotton, raised by plaintiff and intestate, after his death, with the cotton belonging to the estate, and whilst managing the affairs of the estate, she would be liable in her representative character; which charge the court refused, and the plaintiff excepted. The plaintiff then asked the court to charge the jury, that if they believed, from the evidence, that the defendant sold the cotton, by herself or agent, after the death of the intestate, that the term administratrix, used in the plaintiff's writ and declaration, was a mere *descriptio personæ*, and that they might find the defendant liable in her individual capacity; which charge the court also refused, and the defendant excepted.

The charge given, and the refusals to charge as requested are here assigned for error.

JONES & BOWIE, for plaintiff in error.

J. J. WOODWARD, *contra.*

LIGON, J.—The charge given by the court below was free from error. Both in his writ and declaration, the plain-

tiff seeks to charge the defendant in her representative character, and not otherwise. All the counts in the declaration aver a liability on the part of the intestate, and a promise to pay, by the defendant, as his administratrix. It is then, essentially a suit in which the estate of the intestate is sought to be charged with the payment of the demand, and had the plaintiff made such proof as to entitle him to recover, his judgment must have been *de bonis intestatis.* The proof, however, shows a case for which the plaintiff, under his declaration, is not entitled to recover against the estate of John S. Rice. There is no count on a special agreement between the plaintiff and John S. Rice; and yet the testimony establishes that one did exist, and its terms are of such a character that the plaintiff could not recover for a breach of them on the part of the intestate, under any of the counts in his declaration. In Snedicor, admr. v. Leachman, admr., 10 Ala. Rep. 330, in which a recovery was sought for the breach of an agreement very similar to the one proven in this case, and in which the plaintiff declared for work and labor done, the court says, "The plaintiff has sued upon the contract as a money demand; the proof is, that he was to be compensated for his services by a part of the crop, and whilst this contract continues in force, it is manifestly unjust that the plaintiff should disregard it, and sue upon a *quantum meruit.*"

In another aspect of the case, the charge of the court was proper. The proof shows that the plaintiff was to have one-fifth of the crop grown on the plantation which he managed, and that the crop amounted to twenty-one bales of cotton, weighing four hundred and twenty-five pounds. This cotton never passed from the possession of the plaintiff, until after the death of John S. Rice. It was then taken by the defendant and sold. Here is a conversion by her, not in her representative capacity, but as an individual, and as against her the plaintiff may have his action of trover; or, as the cotton has been sold, and its value, by this means, ascertained, he may, if he thinks proper, waive the *tort* and sue in assumpsit for money had and received to his use. Strother, admr. v. Butler, 17 Ala. Rep. 733.

The reasons assigned in support of the charge as given, are conclusive of the correctness of the action of the Circuit

Court in refusing the charges asked for by the plaintiff. This case is unlike that of Peters v. Heydenfelt, 3 Ala. Rep. 205. In that case, both counts of the declaration disclosed that the services were rendered for Peters after the death of his intestate, and at his instance and request. The court says, "The declaration shows very conclusively, that the action is founded on a contract made by the administrator, by which the estate could not be charged in this action, but for which he is individually responsible." In the case under consideration, the declaration, in all its counts, charges the contract to have made with the intestate. The cases are, therefore, utterly dissimilar, and the rule in one would be misapplied if extended to the other.

Let the judgment of the Circuit Court be affirmed.

GORDON ET AL. *vs.* McLEOD, EXECUTOR.

1. Matters cannot be assigned for error in the Appellate Court which were not excepted to, nor in any other manner reserved, by the plaintiff in error, in the court below.

ERROR to the Court of Probate of Wilcox.

On the final settlement of the estate of Robert G. Gordon, deceased, by Alexander McLeod, his executor, the distributees of the estate appeared by attorney, and objected to the allowance of an item of five hundred dollars, with which the executor had charged the estate. No bill of exceptions was taken; but the judgment entry recites all the evidence which was introduced relative to the disputed item, and the judgment of the court, that it was insufficient to authorize the rejection of the charge.

"The decision of the court upon the proof, as shown in and by the record, allowing to the said executor the said sum of five hundred dollars," is now assigned for error.

C. C. SELLERS, for plaintiffs in error.
WATTS, JUDGE & JACKSON, *contra.*

LIGON, J.—The record does not show that the matters assigned for error in this court were excepted to, or in any other manner reserved by the plaintiffs in error, in the court below.

This court has repeatedly held, that it will not revise any supposed error in the decision of an inferior court of law upon facts, unless they are set forth in a bill of exceptions, signed and sealed as the statute directs. 17 Ala. 700; 13 ib. 245; 12 ib. 600; 5 ib. 127; 9 Porter 136; ib. 118; 5 ib. 103; 5 Stew. & P. 330.

We are not disposed to change the practice, even if we were at liberty to do so; and consequently, the judgment of the Court of Probate is affirmed.

STAUNTON *vs.* SIMMONS & SIMMONS.

1. On a motion to set aside a sale made under execution by a constable, to which the purchaser at the sale and the constable are made defendants, it is not a good plea that the plaintiff in the motion had brought an action of trespass in the Circuit Court against the constable, for levying on and selling the property, and had recovered a judgment against him.

ERROR to the Circuit Court of Monroe.
Tried before the Hon. L. Gibbons.

It appears that two executions had been issued against Staunton by a justice of the peace, which had been levied on a horse by John A. Simmons, a constable. The horse was sold at public sale, and was purchased by Robertus Simmons. Staunton afterwards moved the justice to set aside the sale, on the ground that one of the executions had been quashed, and the other paid, before the horse was sold by the constable. The motion was heard by the justice, but he decided against it, and refused to set aside the sale. The plaintiff in the motion took an appeal to the Circuit Court, and in that court the constable and the purchaser, who alone were made parties to the motion, alleged, by way of plea to the motion, that the plaintiff had brought an action of trespass

in the Circuit Court of Monroe, against John A. Simmons, the constable, for levying on and selling the horse, and had recovered a judgment of forty dollars damages; but it did not appear that this judgment had been satisfied. To this plea the plaintiff demurred, but his demurrer was overruled, and the plaintiff refused to plead over; whereupon judgment was rendered against him, and he now brings the case to this court by writ of error.

CUMMINGS, for plaintiff in error.
TORREY, *contra.*

DARGAN, C. J.—We cannot perceive what influence the judgment recovered in the Circuit Court against the constable, could have upon the motion which was made by the plaintiff, to have the sale set aside. We think it was wholly an immaterial matter, and the motion should have been heard and determined in the same manner that it would have been, had no such recovery been had. It is, however, argued that this recovery is a bar to any other suit that may be brought to recover the horse or its value. It will be, however, time enough to decide that question, when the plaintiff brings another action. But if that recovery was pleaded in bar to an action of trover, not brought against the same party against whom the judgment in trespass was recovered, it is probable that the recovery alone, without a satisfaction, would form no bar, (see Spivy v. Morris, 18 Ala. 254; Blann v. Crocheron, decided at the present term). It is not, however, necessary to decide that question before it is raised, and it cannot be raised, in our opinion, upon this motion. The court below should have decided the motion to set aside the sale upon its own merits, without regard to the judgment that had been recovered against the constable. The matter alleged by way of plea formed no bar to the motion; and the judgment must be reversed, and the cause remanded.

SMITH AND WIFE ET AL. *vs.* HOOPER, EXECUTOR.

1. The husband is a necessary party to the settlement of an estate, of which his wife is a distributee, had in the Court of Probate since the passage of the acts of 1848 and 1850, "securing to married women their separate estates."
2. Therefore, an irregular final decree of settlement and distribution, had in the Court of Probate by consent of all the distributees of the estate, to which the husband was not a party, will be reversed on writ of error sued out by the husband and wife for the use of the wife in the name of all the distributees, although the wife appeared on the settlement by attorney in fact, and consented to all the proceedings.

ERROR to the Court of Probate of Dallas.

BOLING & STONE, for plaintiffs in error.
GEO. W. GAYLE, *contra.*

PHELAN, J.—This was a final decree in the Probate Court of the county of Dallas, for the settlement and distribution of the estate of John Hooper, deceased.

The testator died without leaving any children who could inherit his property, and his brothers and sisters were his heirs at law.

The parties to the proceedings in the Probate Court were Z. L. Hooper, the executor, who was a brother, and Francis M. Hooper, Joseph H. Hooper, Henry Hooper, Henry W. Hundly, in right of his wife, Eliza L. Hundly, and Martha M. Smith, the other brothers and sisters of the deceased, who it is stated in the record, were all the distributees, and were all of full age. Some of them appeared by attorneys in fact in conducting the proceedings, and such was the case with Martha M. Smith, who appeared by her attorney in fact, James McDearman.

The parties, to hasten the settlement and distribution of the estate, being all of full age, and many of them residing at a distance, consented that an order should be made for the sale of the real estate of the deceased, in a manner wholly unauthorized by the statute regulating such sales, and the land was sold accordingly.

By the same consent, a sale of the personal estate which was ordered was made for *cash.*

By a like consent, the acts of the executor in conveying to Ohio certain slaves of the testator, which he directed should be done in order to effect their emancipation, and the appropriation of three hundred dollars from the share of each distributee to defray the expense of their removal, which was a sum considerably below what the testator had appropriated for that purpose, were ratified and approved.

A final decree was rendered in favor of each of the other distributees against the executor, Z. L. Hooper, for their respective shares, and he was decreed to retain his own share after final settlement of his accounts, and the parties all acknowledge payment and satisfaction of their respective shares on the record, Martha M. Smith acting as it is said by her attorney in fact, James McDearmen.

After the final decree aforesaid was rendered, Sexton W. Smith, one of the plaintiffs in error, propounded his interest in the estate of John Hooper, deceased, in right of his wife, Martha M. Smith, in the Probate Court, by proper proceedings for that purpose, and was admitted to appear as a party in interest in the settlement and distribution of the estate of John Hooper, deceased, and to litigate all the matters connected with the same; and thereupon a writ of error was sued out by said Smith and wife, (for the use of the wife,) in the name of all the distributees, to reverse the decree aforesaid. These thing were not actually done, but the counsel on both sides representing all the parties, to save time and trouble, agree to consider them as being done, and to amend the writ of error and the record accordingly, and the record and writ of error are so considered.

All the other distributees, appearing in this court by counsel, ask to sever from Smith and wife in the assignment of errors, which is granted them; and they decline to assign errors, and ask that as to them the decree of the court below may be affirmed.

Smith and wife, (use of Mrs. Smith,) assign for error the several matters aforesaid, touching the sale of the property for *cash,* the sale of the lands, and the agreement to ratify the act of the executor, in taking to Ohio the slaves directed to be set free, and the allowance to the executor to defray the expense of their removal.

As these things were all done by consent, and the ordinary course of proceeding was dispensed with, upon the idea that such consent would cure all irregularities, and as it now appears that Sexton W. Smith, the plaintiff in error, as the husband of Mrs. Smith, was not before the court to make any consent, it follows, as a matter of course, that the whole proceeding, which was done irregularly as upon consent, is erroneous.

That the husband is a party in interest in the settlement of an estate of which his wife is a distributee, since the passage of the acts of this State, of 1848 and 1850, "securing to married women their separate estates," it is needless to argue. The words of the statutes, particularly of the statute of 1850, make this manifest. He is thereby allowed the enjoyment of the income of her estate, for his life, (with a special provision as to his liability to be removed from his trusteeship,) without being under any obligation to account for them to any one.

We would willingly respond to the wishes of the other plaintiffs in error, and affirm the decree of the court below as to them, if it could be done so as to answer any good end; but the error which has intervened, is so radical and extensive, and enters so thoroughly into the whole proceedings, that we deem it proper to reverse the decree *in toto*.

The decree of the court below is reversed, and the cause remanded.

ROGERS, ADM'R. *vs.* GRANNIS & CO.

1. In a suit against an administrator *de bonis non*, on a note purporting to have been executed by his intestate, an admission made by the administrator in chief of the genuineness of the signature, is not admissible against the defendant.
2. Nor is the implied admission, arising from judgments recovered against the administrator in chief on notes signed in a similar manner, admissible evidence against the administrator *de bonis non*.

ERROR to the Circuit Court of Tuskaloosa.

Tried before the Hon. Geo. D. Shortridge.

Assumpsit by C. B. Grannis & Co. against the plaintiff in error as administrator *de bonis non* of James McCullough, deceased, on a note purporting to have been executed by the intestate; pleas (among others), *non assumpsit* and *non est factum.*

The plaintiff offered to prove at the trial the admissions of the previous administrator as to justness and genuineness of the note. The defendant objected to this evidence, but the court overruled his objection and admitted the evidence. The plaintiff also offered in evidence other notes of the intestate executed in a similar manner, and proved that judgments were recovered on them against the previous administrator. The defendant also objected to this evidence, but the court admitted it. The defendant excepted to the rulings of the court, and now assigns them as error.

E. W. Peck, for plaintiff in error:

1. The declarations of Mrs. McCullough were not competent evidence against the plaintiff in error.

2. They were not proper evidence, under the issue of *non est factum*, to prove the execution of the note.

3. The other notes, that purported to have been made in the same way the note in this case appears to have been made, were improperly admitted to be read as evidence in this case against the plaintiff in error.

Ormond & Nicolson, *contra:*

The court did not err in admitting the testimony of Cochran, proving the admission of the former administrator, the wife of the deceased, that the claim was just and would be paid. The plaintiff in error is the administrator *de bonis non*, and is bound by any promise or admission made by his predecessor in the administration. Newhouse & Co. v. Redwood, 7 Ala. 598; Paley on Agency, 172.

2. The other notes of the intestate were properly admitted. 13 Mees. & W. 598.

3. An affidavit to the plea of *non est factum* being made, the only question was, whether Haughey, who had signed the note sued on, was in fact the agent of McCullough. If it had

been intended to admit the agency of Haughey, and to deny the *factum* of his signature, it should have been so stated. The mere plea of *non assumpsit* only raised the question of agency, i. e. whether the signature of McCullough's name by Haughey, was equivalent to McCullough's signature m de by himself. Mauldin v. Br. Bk. at Mobile, 2 Ala. Rep. 505.

Such being the case, it was perfectly legitimate to prove the payment of other notes signed by Haughey as agent, and it could make no difference that such notes were sued on. The omission to put the fact of agency in issue, or to make any defence, was, in law, a distinct admission.

CHILTON, J.—The first question arising on this record is, whether the admissions of Mrs. McCullough, made while she was administratrix *de bonis non*, and which tend to show the genuineness of the note sued on, should have been admitted against the defendant, who is sued as her successor.

After the best examination which I have been enabled to bestow upon this point, I have been unable to arrive at the conclusion that the court properly received such admissions.

It is well settled that the admission of one of several administrators shall not be received against another, though they are both defendants to the record, not even to take the intestate's note out of the statute of limitations. Forsyth v. Ganson, 5 Wend. 558; Caruthers & Kinkle v. Mardis, 3 Ala. Rep. 599, and cases there cited; but this proceeds upon the ground that otherwise the representative making the admission would have it in his power to charge the others with a *devastavit*. Does a different principle apply when, instead of being co-administrators, one is the successor of the other?

In Newhouse & Co. v. Redwood's Adm'rs, 7 Ala. Rep. 598, it was held that the admissions of the administrator in chief were admissible against the administrator *de bonis non*, to take the demand out of the statute of limitations, in an action against the latter. It is not necessary now to inquire whether this decision can be supported, because, conceding its correctness, it does not decide the case before us. In that case, there was a debt confessedly due from the intestate, and the only question was, whether it was to be considered as paid or discharged from the lapse of time. The admission of the ad-

ministrator in chief acknowledged its then existence as a subsisting valid demand; in other words, he acknowledged the justness of the demand already existing. Here, the *existence* of the demand is the question. Did the intestate make the note? If he did not, no admission of the former administrator could create a liability upon the estate, but at most, could bind him personally, if such as could be enforced under the statute of frauds.

The distinction between admissions which merely avoid the statute, and those which go to *create* a liability, is recognized in many cases. See cases cited in 4 Cow. 493.

It is discretionary with the administrator, whether he will plead the statute of limitations, and if he make a new promise so as to avoid it, this promise, it may be said, goes with the debt, and revives it against the estate, and consequently against any subsequent representative. But it is not in his power to *create* a debt or liability against the estate, and therefore his admissions cannot be received against his successor. To allow them would, in many instances, work irreparable injury to the estate, in charging it with debts which have no foundation in fact, and in cases of this kind, compelling the estate to lose the demand, or turning the administrator *de bonis non* round upon the previous administrator, to recover for making improper and false admissions. Indeed, no administrator *de bonis non* could tell how the estate would turn out, or what course he should pursue in its administration, if every conversation or admission of his predecessor might be received injuriously to affect it in his hands; see Hall, Ricks & Co. v. Darrington, 9 Ala. Rep. 502. The cases collected in Phillips's Evidence, (C. & H. notes,) vol. 2, 167 to 172, sustain the conclusion that such admissions should not be received.

It follows that, as the direct admissions of the previous administrator could not be received, the implied admission arising from judgments against the administrator in chief, on notes signed in a similar manner by the intestate, was improperly admitted.

Let the judgment be reversed and the cause remanded.

PARKER *vs.* DOE *ex dem.* BURGEN & PEARSALL.

1. When a nonsuit is taken which is afterwards, on a subsequent day of the term, set aside "on the payment of all the costs of suit," and the costs are not paid until after the adjournment of court, the cause cannot be stricken from the docket on motion.
2. A sale for taxes due the city, made by the corporate authorities of the city of Montgomery, under the power conferred upon them by the act of incorporation, (see City Laws, 30,) has the force and effect of a sale under judgment and execution from the Circuit Court; a party, therefore, claiming under such a sale must show that the requisitions of the statutes, as to the assessment of taxes and the subsequent proceedings relative thereto, were complied with.
3. Parol evidence cannot be received to show that a meeting of the Mayor and Aldermen, or board of assessors, was held, as required by the statute, (City Laws, 30,) for the purpose of correcting and sanctioning the assessment.
4. When the record of the proceedings of the corporate authorities does not show that such a meeting was held, the mere advertisement of the Mayor calling the meeting does not warrant the presumption that it was held.
5. Nor can the fact that the meeting was held be inferred from the fact that a sale of certain taxable property, assessed to persons unknown, was ordered by the City Council.

ERROR to the Circuit Court of Montgomery.

Tried before the Hon. John D. Phelan.

When this case was reached on the call of the docket, the plaintiff in error, who was the defendant below, moved the court to strike the cause from the docket, on the ground that it had been previously disposed of; and to sustain the motion, proved that at the last term of the court the plaintiff had taken a nonsuit, which was entered on the minutes of the court, and that on a subsequent day of the term the nonsuit was set aside, on the plaintiff's application, "on the payment of all the costs of suit;" he then proved by the clerk that the costs were not paid until sometime in vacation after the adjournment of the court. On this state of facts, the court decided that the case was still pending in court, and overruled the motion to strike it from the docket; to which defendant excepted.

This was an action of ejectment brought by the defendants in error, against the plaintiff, in the Circuit Court of Montgomery, to recover part of lot number seven, in the City of

Montgomery. The plaintiffs below proved that the patent to said lot was granted to John Falconer, and then showed a regular chain of conveyances from Falconer to themselves. The defendant below claimed title under a sale for taxes due the City Council of Montgomery for the year 1840.

The plaintiff in error introduced the Clerk of the City Council of Montgomery, who testified that the Council kept minutes of some of its proceedings, and produced a book which he proved contained the minutes of the Council, from which defendant read the following orders and resolutions: "City Council in session, 30th April, 1840. The following resolution was offered by Ald. Blue, and adopted, to-wit: Resolved, That the following persons be and they are hereby appointed assessors of the value of real estate in the City of Montgomery for the municipal year 1840: For ward No. 1, Samuel Parsons; No. 2, Lewis Owen; No. 3, John Murphy."

"City Council of Montgomery, in session August the 5th, 1840. The following resolution offered by T. Tarleton and unanimously adopted, to-wit: Resolved that a tax of one-half of one per cent. upon the value of all real estate, within the corporate limits of the City of Montgomery, be and is hereby declared to be the rate of tax for the municipal year 1840."

It was shown that this tax was assessed and returned, according to the requisitions of the charter of incorporation, that the lot in question was assessed at $150 value, and set down to an owner unknown. An advertisement of the Mayor was then introduced, and proved to have been duly published, in which the owners of real estate in the City of Montgomery were notified, that the City Council would meet on the 18th of August, 1840, at the Mayor's office, "to hear and determine upon all complaints which may be made against said assessment, and to correct errors, and supply omissions."

Thorington, who was Mayor of the City of Montgomery for the year 1840, was then introduced as a witness by the defendant in the court below, and testified, that his recollection was not very distinct, but had been refreshed by hearing the notice read to the jury, and he had some recollection that a meeting was held at the time and place mentioned in the notice, for the purposes mentioned in the notice, and that he had no doubt that said meeting was held. The plaintiff

objected to this proof, and it was ruled out by the court in its charge to the jury.

Neither the minutes of the Council, nor the records of the City, show that the meeting spoken of by the witness had ever been held.

The defendant below then read from the minutes of the City Council a resolution requiring the sale of lots, the owners of which were unknown, and which had been assessed for the year 1840, for the payment of taxes, on the first Monday in June, 1841. The meeting at which this resolution was adopted was held on the 27th February, 1841. At a meeting on the 22d March, 1841, this sale was ordered to be postponed until the first Monday in July of that year.

An advertisement for the sale of such lots, which included the one in controversy, was shown to have been regularly made, and in pursuance thereof this lot was sold, and was purchased by the plaintiff in error, he being the highest and best bidder for the same. It was further shown that he complied with the terms of the sale, and received the tax collector's deed for the premises, which he produced and proved before the jury.

Upon this proof the defendant moved the court to instruct the jury, "that if they believed from the evidence that there was a meeting of the City Council of Montgomery, at the time specified in the notice which had been read to them from the newspaper, for the purpose of correcting errors, and supplying omissions, and passing on the assessment, and rectifying all errors, that then the defendant was entitled to recover," which charge the court refused to give; but charged the jury, that if such a meeting of the City Council was held for that purpose, and did pass upon said assessment, and rectify errors, and supply omissions, that if the minutes of the City Council did not show the facts, then they must find for the plaintiff.

To the refusal to charge as requested, and to the charge given, the defendant excepted.

The defendant then requested the court to charge the jury, that if they believed from the evidence that the City Council ordered a sale of the property assessed to persons unknown, that then they may presume from that fact that the City Council did correct errors, and supply omissions, and pass on

the said assessment; which charge the court refused, and the defendant excepted.

The court instructed the jury that they could not regard the testimony of the witness Thorington, as in the opinion of the court the facts sought to be proved by him could only be shown by the minutes of the City Council, and not by parol evidence. To which the defendant also excepted.

The overruling the motion to strike from the docket, the instructions given, and those refused by the court, are here assigned for error.

Harris, for plaintiff in error.

I. The first charge given by the court below, as shown in the bill of exceptions, was an affirmative charge, and made the title of the defendant in the court below to depend entirely upon the fact that there was written evidence of the fact of the meeting of the City Council for the correction of errors, &c., in the assessment of taxes. In was, in effect, an instruction to the jury that, although the defendant in the court below had proven every other fact essential to the validity of his title except written evidence of the meeting to correct errors, yet if there was no written evidence of the meeting to correct errors, &c., they must find for the plaintiff in the court below. The charge made the title of the defendant in the court below to depend upon a fact which was not essential to its validity, and was therefore erroneous. Nabors v. Camp, 14 Ala. Rep. 460; Carlisle v. Hill, 16 Ala. Rep. 398.

II. Neither the objection to the admissibility of the evidence of Col. Thorington, nor the charge of the court predicated upon it, made the admissibility and validity of the testimony to depend upon the fact that the proper preliminary proof to authorize its admission had not been made. This court must therefore presume that it was shown that the minutes of the City Council failed to show that the meeting testified to by him was held. Tharp v. The State, 15 Ala. Rep. 749; Ware and Cowles v. Dudley, 16 Ala. Rep. 745.

III. The charge of the court makes the validity of the title of the defendant in error to depend entirely upon the fact that there was written evidence of the meeting to correct er-

rors, &c.; and there is nothing, either in the common or statute law, that makes the validity of the proceedings of a corporation to depend upon the existence of written memorials of evidence of the act. Angell & Ames on Corporations, 233; Bank of U. S. v. Dandridge, 12 Wheaton's Rep. 64; Bassett v. Marshall, 9 Mass. Rep. 312.

IV. The same presumptions may be drawn from the acts of corporations that may be drawn from the acts of private persons. Middlesex Husbandmen v. Davis, 3 Metcalf, 137; 12 Wheaton, 64; 3 Pickering, 336–340; Montgomery R. R. Co. v. Hurst, 9 Ala. Rep. 513; Bates v. State Bank. 2 Ala. Rep. 451.

MARTIN & BALDWIN, *contra.*

The court did not err in refusing to strike the case from the docket. Ex parte John Lowe, present term.

The charter of the City of Montgomery authorizes it to pass such ordinances and by-laws, not contrary to the Constitution and laws of the State and the United States, as the Mayor and Aldermen shall from time to time deem necessary and proper to carry into effect the true intent and meaning of the act, and the same to enforce, alter and repeal. City Laws, 26, § 5. An assessment of taxes by the City Council can be made only by an ordinance. Ib. 26, 30. An ordinance is a *law*, a *statute*, a decree. 2 Bouvier's Law Dictionary, 225; and in this case, if not by express enactment, must by implication of law be in writing. Angel & Ames on Corp. 164; Black's Com. 475.

An assessment, to have the force and effect of a judgment and execution, to authorize the sale of lands, and the seizure of the body of any citizen of the State, or United States, must be in writing; on the universally acknowledged principle that the title of real estate will not pass, except some memorandum of the transfer shall be in writing, signed by the party to be charged, or by some other person by him thereunto authorized. An act of this character would be inconsistent with the laws of this State, aud expressly prohibited by the charter incorporating the City of Montgomery. City Laws, 26; Black. Com. 475.

The mode of action prescribed by the charter of an incor-

poration must be rigidly pursued. 1 Cranch, 166; Angel & Ames on Corp. 167. Corporations cannot make a parol contract. 1 Black. Com. 475; Angel & Ames, 164. The proper mode of proof of the appointment of an agency, is by the production of the record or books of the corporation. Angel & Ames, 219–220. And with much greater force may it be insisted, the acts of the Mayor and Aldermen, affecting the title of real estate, shall be proved in like manner. Of the transaction of a board of directors or Councilmen, there ought to be some written memorial, as the body consists of several persons, and there is no other method of authenticating the common mind. 1 Dev. & Bat. 306.

The appointment of directors of a corporation cannot be proved by reputation. They should be proved by the minutes of the corporation. 7 Cowen, 234. If secondary evidence can be resorted to under any circumstances to prove the action of the Board of Mayor and Aldermen, the existance of the record must be proved and its absence accounted for to make the secondary evidence admissible. 12 Wheat. 115.

LIGON, J.—The motion to strike the case from docket in the court below was rightly disallowed. *Ex parte* Lowe, at the present term.

It will be impossible to consider the first and third exceptions separately, as they are most intimately connected; and if the action of the court below was correct on the matter involved in the third, then the ruling on the point presented by the first would follow as a consequence. It is manifest, also, that, at the trial, the charge brought to our notice by the third exception must have been prior, in point of time, to the others that were given or refused.

It seems, that after the witness (Thorington) had been permitted to testify, against the objection of the plaintiffs, the court, in its original charge to the jury, instructed them to disregard this proof, as the facts deposed to by him could only be shown by the minutes of the City Council. These facts were, that a meeting of the council was held, to pass on the assessment of the year 1840, to correct errors and hear complaints.

By the twelfth section of the act of 1837, entitled, "An act to incorporate the city of Montgomery," it is provided: "That the said City Council shall cause an assessment of taxes to be made in each and every year by some proper and fit person or persons; the assessment naming the person liable to such taxes when known, and specifying the property when the owner is not known, which assessment shall be returned to the Mayor, to be laid before the Mayor and Aldermen; and the Mayor shall cause at least ten days public notice to be given that assessment has been made, and of the time when the Mayor and Aldermen will proceed to hear and determine upon all complaints which may be made against such assessment, and it shall be their duty to correct errors, and supply omissions; and when the same has been passed upon by the said City Council, the said assessment shall have the force and effect of a judgment and execution, and may be collected by levy and sale of property, on giving such notice as is required by law, on executions from the Circuit Court," &c. (Code of Laws of City of Montgomery, 30.)

By the eighth section of the act of 1828, entitled, "An act to amend an act to incorporate the Town of Montgomery," and which is still in force since the style of the corporation is changed to "the City of Montgomery," it is provided, "that the said Intendant and Councillors shall appoint a Clerk, whose duty it shall be to keep a fair record of the proceedings," &c.

It was evidently the intention of the Legislature to require the City Council to keep a record of all its proceedings, and it provides an officer, whose duty it shall be to make out and keep the records thus required. The language defining the duties of the Clerk of the Council is as strong in its import, as that employed in relation to clerks of courts.

The importance, indeed the absolute necessity of recording the proceedings of all meetings of the council, held in pursuance of the twelfth section of the act of 1837, will readily be seen, when we advert to the object of such meetings, and the legal effect of their proceedings. No assessment of taxes can be perfect or complete until it has been passed upon by such a meeting; and its acts, when the assessment is corrected and adjusted by them, are clothed with the authority of

judgment and execution. Upon these, the tax collector can proceed to sell the real estate within the city limits, when the taxes remain unpaid, and to this record the plaintiff in error must resort to make out his title, for it is well settled, that when one claims title under execution sale, he is bound to show a judgment, or his title fails.

By the charter of the city of Montgomery, section twelve, *supra*, it is further provided, "that all sales made under, or by virtue of such assessment, shall convey to the purchaser the same title as if sold by execution from the Circuit Court; and the collector of said city shall, in case of sale of real estate, give the purchaser a deed of conveyance, which shall vest in the purchaser the same interest that the person had against whom such tax was assessed at the time of such assessment, and where the owner is not known, the entire equitable and legal interest in such real estate, discharged from all liens." It is also provided in the last clause of the same section, "that the duties required of the said Mayor and Aldermen, except giving notice and issuing *capias ad satisfaciendum*, may be devolved upon a board of assessors, and the assessments approved by them shall have the same force and effect as if approved by the Mayor and Aldermen." By express provision of this section, the sale under the assessment approved and sanctioned by the Mayor and Aldermen, or by the board of assessors appointed by them, is to convey to the purchaser such title, as sales under writs of execution from the Circuit Court would vest in purchasers under them. When real estate is thus sold under execution, unless a judgment can be shown which will support the execution, the purchaser takes no title, for he purchases under a void process. The same rule must apply here, and that which the act of incorporation substitutes for the judgment of the Circuit Court, that is, the proceedings of the Mayor and Aldermen, or their substitutes, a board of assessors, correcting and sanctioning the assessment, must be shown to justify the sale by the tax collector, and support the title of the purchaser.

By what testimony can the existence of this judgment, or its equivalent be shown? In the case of a judgment, the answer is plain: by the record of the court in which it is obtained, and by that alone. And one reason for this is to be

found in the fact, that with us real estate cannot be sold by process from any court which is not a court of record. It is highly improbable to suppose that the Legislature could have intended to enable a corporation to do that without a record, which it denied to the inferior tribunals of the State, which are not required to keep a record of their proceedings; and especially is it so, when we see that by the charter of this corporation it has provided an officer, and made it his duty to keep a fair record of its proceedings. For this reason, we think, the Court might well have refused to let the testimony of Thorington go to the jury, when it was objected to by the plaintiffs, and that it did not err, when it instructed the jury to disregard it.

The views here expressed do not at all conflict with the ruling of the Supreme Court of the United States, in the case of the Bank of the United States v. Dandridge, (12 Wheat. 64) which was relied on by the plaintiff in error. The decision in that case was influenced by the consideration, that, the charter of the bank did not require it to keep a record of the acceptance and approval of the bonds of its officers; and as there was no such requisition in the charter, and the bond of Dandridge, as cashier, was filed among its papers, and he had acted in that capacity in the Branch at Richmond for a number of years, the court said, the acceptance and approval of the bond would be presumed. In this case, however, we have seen, the charter requires a record to be kept of the proceedings of the corporate authorities, and no presumption in favor of the acts of its officers in this respect can be indulged, in the absence of such record.

This testimony being excluded from the jury, there remained no evidence whatever that the meeting of the council required by the charter was ever held, to act on the assessment of 1840; and consequently, the first charge asked for by the plaintiff in error was abstract, and had it been given, could have had no other effect than to mislead the jury; the court, therefore, very properly refused it. The records of the proceedings of the council, which were produced and identified by the clerk, did not disclose that any such meeting had taken place; and the advertisement of the Mayor calling such a meeting, in the absence of any record evidence of its having

convened, would not justify the presumption that it had been held, and that its acts were such as to perfect the assessment, and give to it the force and effect of a judgment and execution against those whose property had been assessed. The charge given by the court, that the proceedings of the council could only be proved by the record of their acts, made according to the requirements of the charter, was a fair exposition of the law, and, in our opinion, free from all error.

The second charge asked was correctly refused, for it cannot be tolerated that an act void and improper in itself, unless supported by another and a previous one, should be allowed to go to the jury for the purpose of creating a presumption that the former had been done. This would be inverting the rule of evidence in purchases under execution sales, and allowing the writ of execution to prove the judgment on which it purports to have issued; instead of producing the judgment to sustain the execution and sale.

There is no error in the record, and the judgment must be affirmed.

BILBERRY, Adm'rx *vs.* MOBLEY.

1. The fact that a creditor was unable to collect his debt is evidence tending to show the insolvency of the debtor, and is admissible for that purpose; but it may be explained by showing that the inability to collect did not result from the debtor's inability to pay.
2. The declarations of one in possession of personal property, as to the ownership, are not evidence of the condition of the same property more than three years before the declarations were made.

Error to the Circuit Court of Dallas.

Tried before the Hon. E. Pickens.

This was a trial of the right of property of cotton, which had been levied on by an execution against Isham Bilberry, originally claimed by Henry Bilberry, and the proceedings continued after his death by the defendant as his administratrix. The bill of exceptions shows that the plaintiff below

offered to prove the insolvency of the defendant in execution, by proof of the fact, that he was owing money to a witness who was introduced, and that such witness had not been able to collect it from him, without producing any execution returned "*nulla bona.*" This evidence was objected to, but the objection was overruled, and the evidence admitted.

The plaintiff's execution was issued by a justice of the peace in December, 1847, and there was evidence tending to prove that the property levied on had been sold to the defendant's intestate, Henry Bilberry, for a mare. The plaintiff offered to prove that during the year 1851, the defendant, acting as administratrix of Henry Bilberry, claimed the mare as her individual property, to which the defendant also objected, but the objection was overruled, and the testimony admitted. The admission of the evidence objected to, is here assigned for error.

George W. Gayle, for plaintiff in error.

1. The evidence of the insolvency of the defendant in execution was improperly admitted. The insolvency of a party cannot be shown by the fact that *one man* could not collect his debt. It may have been that the defendant in execution was out of the State, or had moved away. The record does not show that the witness had ever brought suit, or run an execution, or that the defendant was "embarrassed." Parker v. Branch Bank at Montgomery, 5 Ala. Rep. 731.

2. The declarations of the administratrix, as to the ownership of the property, were improperly admitted; first, because she made the declaration as administratrix, and of course it could not bind the estate; secondly, because the declaration was made more than three years after the claim was interposed, and after the issue in the claim suit was made up.

Campbell & Bird, *contra.*

1. The declarations of ownership were admissible, being made by one in possession. Oden v. Stubblefield, 4 Ala. Rep. 40; Bliss v. Winston, 1 ib. 344; Mobley v. Bilberry, 17 ib. 428.

2. There was no error in admitting the evidence of the insolvency of the defendant in execution. 5 Ala. Rep. 731.

GOLDTHWAITE, J.—The first question presented on the record is simply, if evidence that a creditor was unable to collect his debt was admissible to show the insolvency of the debtor. We are of opinion that it was. This evidence, standing by itself, and without explanation, warrants any inference which could have been drawn from it, had a demurrer been interposed, and in that case the cause of the inability of the creditor to collect might have been legitimately referred to the want of ability on the part of the debtor to pay. The party against whom the evidence was offered, could have protected himself fully by a cross-examination, and have shown that the failure of the creditor to collect was not in fact owing to the inability of the debtor to pay, or he could have insisted before the jury on the insufficiency of the evidence. There was no error in admitting this testimony.

2. The evidence that the administratrix, more than three years after the execution had issued, by which the property was levied on, while acting as the representative of the claimant, had asserted her individual ownership of the mare for which the cotton had ostensibly been sold, was improperly admitted. There was evidence tending to show a sale of the cotton to Henry Bilberry, and the only object in the introduction of this testimony, that we can perceive, was to show a state of facts inconsistent with an actual and *bona fide* sale, and thus proving that it was fraudulent. The sale must have been before the levy, and the claim of the property constituting its consideration, by the administratrix of the party to whom it was made, at an interval of more than three years, is of itself too remote to authorize any legitimate conclusion of the condition of the same property at the time of the sale. The evidence was therefore irrelevant, and as it may have prejudiced the party against whom it was admitted, it is an error for which the judgment must be reversed, and the cause remanded.

COLLIER, EXEC'R, *vs.* SLAUGHTER'S ADM'R.

1. A condition annexed to the vesting of a legacy requiring the guardian's approbation of the legatee's marriage, is not *in terrorem* only, when the condition is confined to marriage under twenty-one, and there is a limitation over.
2. When a legacy is given, to vest upon the legatee's arriving at the age of twenty-one, or marrying before that time with the approbation of her guardian, and the legatee marries under twenty-one with the consent of her grandfather, with whom she is living at the time, this is not a compliance with the condition, although at the time her father and mother are dead, and she has no legally constituted guardian.
3. A testator by will directed that his estate should be kept together until his daughter married or attained the age of twenty-one, and that in the meantime she, and his three step-children, Ellen, John and Lawrence, should be supported and educated out of the proceeds. Another clause was in the following words: "When my daughter becomes of age, or is married, she is to have my farm," &c. (describing it), "and one half of my personal estate, money on hand, and claims of every kind due or to become due for money or personal estate; the other half of my personal estate, as just above stated, I wish and direct to be equally divided amongst my three step-children above named, as they respectively become of age, or Ellen may marry with the approbation of her guardian. But in the event that any or all of my step-children shall die before they arrive of age, or Ellen may marry as aforesaid, then the amount herein devised to them or either of them, as may happen, is to be divided as follows," &c. *It was held*,

   That the legacies to the step-children did not vest in them absolutely upon the testator's death, but were contingent until the legatees respectively arrived at the age of twenty-one, or Ellen married with the approbation of her guardian; and that, Ellen having married under twenty-one without the approbation of her guardian, the share of one of the step-children who afterwards died, before reaching the age of twenty-one, did not pass to his personal representative.

ERROR to the Court of Probate of Limestone.

JAMES ROBINSON and J. W. SHEPHERD, for plaintiff in error:

1. The legacies to the step-children did not vest on the testator's death, but were contingent until the happening of the specified event. The bill of exceptions shows that Ellen was born in 1823, John in 1825, and Lawrence in 1827, while Amy, the testator's daughter, was born in 1830 or 1831. The three step-children, then, would arrive at the age of twenty-one, if they lived, before Amy became of age, and probably before her marriage. But the whole estate was to be kept to-

gether until Amy attained her majority or married, and this is the general intent of the testator. The *division* then among the step-children must refer to the *vesting* of their legacies, and not to the time of *payment.* A different construction would make the testator deal more kindly towards his step-children than towards his own daughter; for if each one of the step-children was entitled to have a division of the whole estate, and to withdraw his share on attaining majority, the entire burthen of the support, maintenance and education of the others would be thrown upon Amy.

2. Ellen's marriage controlled the vesting of her own share only, and had no connection with the vesting of her brothers' shares. The testator did not intend that all the legacies should vest at the same time. There was no reason why the shares of her two brothers should be made to depend upon Ellen's marriage. They could not in any manner control or affect her conduct. The condition which was annexed to her marriage shows that it was personal, and was not intended to apply to the shares of her brothers. Her share vested on her marriage "with the approbation of her guardian," or attaining twenty-one; theirs vested only on their arriving at twenty-one.

3. But if Ellen's marriage controlled the vesting of her brothers' legacies, then it must be shown that her marriage was had "with the approbation of her guardian." The proof shows that her father and mother were both dead at the time of her marriage, and that no guardian was ever appointed for her by any court. The grandfather, as such, was not her guardian. 1 Black. Com. 380; 2 Kent's Com. 220. And even if he were, the "written *consent*" which he gave was not equivalent to "*approbation.*" It was the duty of Ellen, after she arrived at the age of fourteen, to apply to the proper court for the appointment of a guardian. In default of her so doing, the legacies could not vest upon her marriage. Marriage with approbation was a condition precedent to the vesting of the legacies. If void, *as a condition*, still it was good as a limitation of time; it marks the time at which the legacies were to vest.

4. The condition does not fall within any of the classes of conditions which are held void because in restraint of mar-

riage, 1. It is a condition *precedent.* 2. It is confined to marriage *under twenty-one.* 3. There is a bequest over. 4. Marriage with approbation is only *one of two events*, on either of which the legacies will vest. 1 Jarm. on Wills, 836; 1 Powell on Devises, 282; Scott v. Tyler, 2 Brown's Ch. 431; Smith's Lead. Cas. in Eq. vol. 2, 89, (71 Law Lib. 266.)

R. C. Brickell and Wm. H. Walker, *contra:*

1. This is a vested legacy, to be divested upon certain contingencies. It has the usual accompaniment of a vested legacy, viz: the gift of the interest or use. 8 Ala. 687; 6 Paige, 541.

2. But conceding that the legacies did not vest until the marriage of Ellen, they certainly vested in all the step-children upon the happening of that event. The testator evidently intended that all the legacies should, in one contingency, vest at the same time, viz: the marriage of Ellen. The language of the clause certainly makes the shares of her brothers depend upon Ellen's marriage, just as her own share, and there is nothing unreasonable in such a bequest. When the language is clear and explicit, as in this case, the court cannot make a will for the testator, by adding words which entirely change the meaning of the clause. Roper on Legacies, 1460.

3. There was a substantial compliance with the condition imposed upon Ellen to marry "with the approbation of her guardian." It is a settled rule of law, that conditions precedent, which are to create an estate, ought to receive a liberal construction, and if the condition be performed as near to the intent as possible, it will be sufficient. Crabb's Real Property. vol. 2, § 253. At the time of the testator's death, Ellen had no guardian, and he appointed none for her. She took no estate under the will which could pass to a guardian. Hence the testator could not have intended to require the consent of any particular person, but only to guard against an improvident marriage, by requiring the approval of the person who happened at the time to stand in the relation of guardian. There is no difference here between "*consent*" and "*approbation.*" When consent is required and given, *however reluctantly*, it is sufficient. Dashwood v. Bulkley, 10 Ves. 251.

The consent of the grandfather in this case was sufficient. Ellen had lived with him from the time of the testator's death up to the time of her marriage, and he stood *in loco parentis* to her. If he had taken possession of her estate, the court would have treated him as her guardian, and made him account as such. 9 Porter, 636. So, he could have maintained an action for her abduction. 7 Watts, 502, cited in Reeve's Domes. Rel. 293. The restriction imposed by the will is precisely the same imposed by statute. Could this court hold that the penalty given by the statute is recoverable of the clerk, for having issued the license of marriage upon the written consent of the grandfather? If not, it must be because there was a substantial compliance with the requisitions of the statute.

4. But if the condition was not performed, it was dispensed with. The duty of appointing a guardian devolved upon the Orphans' Court, and that court having neglected to perform its duty, Ellen cannot be made responsible for its default. Where a literal compliance becomes impossible, from unavoidable circumstances, and without the party's default, it is sufficient that it be complied with as near as may be. 1 Story's Equity, § 291. Where the condition becomes impossible, by the death of the person whose consent was required, the condition is dispensed with. White & T.'s Lead. Cas. vol. 2, 326. Where written consent was required by the will, the courts have dispensed with it, and held verbal consent sufficient, 12 En. Ch. R. 19; 1 Sim. & St. 165. Where the condition has been performed *to a reasonable intent*, the court has dispensed with the want of circumstances, 1 Atkyns, 361.

DARGAN, C. J.—William E. Collier, by his last will and testament, directed, that after the payment of his debts, all his estate should be kept together until his daughter Amy should marry or attain the age of twenty-one years, and in the mean time she was to be supported and educated from the proceeds of his estate. After making some provision for the father and mother of the testator's deceased wife, the will proceeds in the following language; "It is also my wish that my three step-children, Ellen F., John R., and Lawrence S. Slaughter, shall be kept, supported, and educated out of the

proceeds of my estate, until the marriage or mature age, as above stated. When my daughter become of age, or is married, she is to have my farm in Limestone county, on which I now reside, with all the improvements and appurtenances, and one-half of all my personal estate, money on hand, and claims of every kind, due or to become due, for money or personal estate. The other half of my personal estate, as just above stated, I wish and direct to be equally divided amongst my three step children above named, as they respectively become of age, or Ellen may marry with the approbation of her guardian. But in the event that any or all of my step children shall die, before they arrive of age, or Ellen may marry, as aforesaid, then the amount herein devised to them, or either of them, as may happen, is to be divided as follows, to wit; one-half of such share to my daughter, one-fourth to the children of Dr. Young, and the other fourth to the children of C. E. Collier."

The step children named in the will are all older than the testator's daughter, and Ellen is the eldest of the step children. After the death of the testator, Ellen married George W. Marshall. She was about fifteen years of age at the time of marriage, but had no guardian. Before her marriage, however, she applied to the acting executor of the will for his consent to marry, but he refused. She then applied to her grandfather, with whom she was living, and he also refused to give his consent, and persisted in his refusal, until he was informed that if he did not consent, the parties would elope and marry elsewhere. He then consented to the issuance of the marriage license, but the parties were not married at his house.

Shortly after the marriage of Ellen, Lawrence S. Slaughter died, being a minor at the time of his death, and his administrator claims the legacy bequeathed to him by the testator. These facts give rise to the material question in the case, which is this; Was the legacy so vested in Lawrence S. Slaughter at the time of his death, as to be transmissible to his representatives?

It is too clear to admit of argument, that the legacies did not vest absolutely in the step children by the death of the testator. They could not demand payment until they arrived at age,

or until Ellen F., the step daughter, married with the approbation of her guardian; for the will expressly gives the legacies over, if either of the step children died before either of these events. The legacies were then conditional, and became vested in the legatees upon the happening of the one or the other of these contingencies, and if neither of them happened during the life of Lawrence S., his administrator takes no interest in the legacy, nor can he call the executor of the testator to an account, or demand payment of the legacy.

As the legatee died before he attained the age of twenty-one, his legacy passed over to those who were to take in that event, unless it became vested by the marriage of his sister, Ellen F.; for by the terms of the will, we think it clear that the testator intended, that if Ellen should marry with the consent of her guardian, before she attained the age of twenty-one, then all the step children named in the will became immediately entitled to their legacies, and the subsequent death of one of them before he attained his majority would not devest his title, so as to enable those in remainder to take, but the legacy, being vested by the marriage, passed, upon the death of the legatee, to his representatives. The sole question, therefore, is, did the marriage of Ellen vest the legacies in the step children? In order to do this, we are all of the opinion that the marriage must have been with the consent of her guardian. This pre-requisite to the marriage, in order to make it have the effect to vest the legacies, the testator, by his will, required, and we do not see how we could hold the pre-requisite unnecessary. It is true, that there are many cases to be found where marriage with consent is held to be *in terrorem* only, and if the legatee marry without consent, he will not thereby forfeit his legacy: but where marriage with consent is only one of two conditions upon which the legacy is to vest, as where it is to vest upon marrying with consent, or at a particular age, say twenty-one, I have found no case which holds that the consent required by the testator was *in terrorem* merely, and that the marriage, within itself, and without the required consent, would vest the legacy. In the case of Hemmings v. Munckly, 1 Coxe, Ch. R. 39, the testator gave a legacy to his daughter on her attaining the age of twenty-eight years, or day of marriage, which-

ever should first happen, provided his daughter should marry with the consent of his executor in trust. The daughter married without the required consent, and died before she attained the age of twenty-eight. It was held, that the legacy had not vested. The case of Scott v. Tyler, 2 Brown Ch. R. 431, is to the same effect; see also Jarman on Wills, Vol. 1, 838.

Nor can such conditions be held invalid, as being in restraint of marriage. The authorities above referred to show this, and besides, many prudential reasons may concur in influencing a parent to desire to restrain the marriage of his child, at least until he attains the age of majority, unless such marriage should take place with the consent of some one whose experience might be some protection against an imprudent or improvident marriage. The question, then, is narrowed down to this; did Ellen marry with the consent of her guardian, within the meaning of the testator? We are of the opinion that the testator meant that she should marry with the consent of her legally appointed guardian, or at least, with the consent of one who in law would be considered such. But the grandfather, as such, is not the guardian of his grandchild, and the marriage with his consent was not a compliance with the condition. It has, however, been urged, that as Ellen had no guardian, she could not comply with the condition, or more nearly comply than by marrying with the consent of her grandfather, with whom she resided. But according to our law, she could, by her own act, have had one appointed, whose consent would have been a legal compliance with the condition. She therefore could have married during minority, with the consent of her guardian legally appointed, but she has not done this, and therefore has not complied with the condition. The consequence is, that neither of the legacies vested upon the marriage of Ellen; they still remained contingent until the legatees should attain the age of twenty-one, and Lawrence having died before he was twenty-one, his legacy passed over to those entitled upon that contingency. It follows, that the decree of the Probate Court must be reversed, as the administrator of of Lawrence is not entitled to the legacy.

Decree reversed, and cause remanded.

JOHNSON AND WIFE *vs.* KING.

1. In assumpsit against husband and wife, on a note executed by the wife *dum sola*, two writs having been issued, but only one served on each defendant in different counties. it is not error to refuse a motion to quash the writs, on the ground that there was no endorsement showing that they were for one and the same cause of action. Such objections must be pleaded in abatement, if the defendant wishes to avail himself of his right to review the decision of the court below.
2. Persons who sign their names to a note will be presumed to be joint makers, in the absence of any thing to the contrary on the face of the note.
3. When suit is brought against husband and wife on a note executed by the wife *dum sola*, the husband may set-off one-half of the amount paid by him before suit brought on a judgment which was recovered against the wife *dum sola* and the plaintiff, on a note executed by them jointly.
4. But he cannot set off such a payment made by him after the institution of the suit.
5. Therefore, where two such judgments were recovered, one of which was paid by the husband *before*, and the other *after* the institution of the suit, a charge that he was entitled "to set-off one-half of the amount paid by him on said judgments," is properly refused.

ERROR to the Circuit Court of Washington.
Tried before the Hon. John Bragg.

This was an action brought by King against Johnson and wife, on a note made by Mrs. Johnson before her marriage with Johnson.

Two writs were issued in this case precisely alike; one was executed on Johnson by the sheriff of Mobile, and the other on his wife, by the sheriff of a different county. It is not said in the endorsement on the writ, that they are both for the cause of action. The defendant moved to quash for this cause, which the court refused, and the defendant excepted.

At the trial the plaintiff introduced his note, and proved that Mrs. King, the maker of the note, had intermarried with the defendant Johnson, in November, 1844, and there was no proof when the note was made, other than that furnished by the face of the note, which bore date 1st October, 1844. It was proved that plaintiff was the son of Mrs. Johnson, and that Johnson and his wife had separated in 1848, and had not lived together since. The defendant Johnson introduced

the records of two judgments recovered against plaintiff and his mother, the defendant's wife, and proved that both of the judgments were founded upon notes made by plaintiff and his mother, on both of which plaintiff's name was signed first. One of these judgments was paid by defendant Johnson after his marriage, and before this suit was brought. The other judgment was recovered against defendant Johnson and his wife in October, 1846, and was paid by Johnson, but when, is not specified. The defendant proved that plaintiff was a business man, and that he and his mother, defendant's wife, lived together at the time the notes on which these judgments were obtained were made; that he controlled her business and had but little property of his own.

The defendant requested the court to charge the jury; 1. That it was necessary in order to enable the plaintiff to recover of said Johnson, to prove that the note was made before the marriage of Johnson with Mrs. King, and that the date of the note, under the circumstances of the case, was not sufficient proof of that fact; which request the court refused, and charged that the note was *prima facie* proof that it was made on the day it bears date.

2. That the jury had the right to infer from the evidence that on the two notes, upon which judgments were obtained against plaintiff and his mother as aforesaid, the said plaintiff was principal and his mother surety, and that in such case, the defendant could set off the amount of said notes against the note in suit. This also the court refused.

3. That in this case the parties must be considered, in the absence of all proof, joint makers of said notes, and that when one of two joint makers pays a note made by both, in the absence of all other evidence, he was entitled to contribution from his co-maker, and that defendant was thus entitled to set off one-half of the amount paid by him upon said judgments. This was also refused.

The refusal of the motion to quash, and of the charges aforesaid, are assigned for errror.

D. Smith and O. S. Jewett, for plaintiff in error:

1. The note was not, of itself, evidenee in this cause, unless its execution was first proved. Because "on the com-

mon counts, and *other forms of pleading*, other than a declaration on a written instrument itself, the written instrument is not evidence unless proved beforehand." 4 Porter, 527; 5 ib. 154.

It is urged that this is not a suit *upon the note*. A suit upon the note, *alone*, would not charge Johnson, the husband, as he was no party to the instrument. His liability arises out of his marriage, and the duty which that imposes on him to pay the wife's debts, contracted previously to marriage. The declaration in this case charges the defendant by alleging, first, the making of the note by the wife, on the —— day of October, 1844; second, the marriage of the maker subsequently with James Johnson; and deduces the liability from these two facts; the proof of which are necessary to make out a case.

Now, if the suit arose from the instrument alone; that is, the suit was "founded on any writing," it would have been necessary to plead *non est factum*. But being founded on the writing *and* the marriage, the plea of *non assumpsit* was sufficient to require the plaintiff to prove the allegations in the declaration; and such being the case, the *writing* was not proof of any thing, till its own execution was proved.

2. The judgments, at least one half of them, paid by Johnson, should have been allowed under the plea of off-set.

Because every note, judgment, &c. against several persons, is a joint and several obligation of each person. The plaintiff was equally liable with James Johnson to pay the judgments, which Johnson had paid in full, and the latter having paid the entire judgment, was entitled to a contribution from King, of one-half; that half should have been allowed as an off-set, and the refusal to allow it was error. Fitzpatrick, Ad'mr. v. Hill, 9 Ala. Rep. 787, and cases referred to. See also, 6 Ala. 780; 3 ib. 257; 10 ib. 516; ib. 557; 2 ib. 71; 14 ib. 201; 12 ib. 225; 11 ib. 548; 16 ib. 465.

WILLIAMS & COCKE, for defendant in error:

I. There was no error in refusing to quash the writ, because, 1. There was no irregularity, the second being but an *alias* to bring in Mrs. Johnson, as to whom a return of *non est* on the original writ had been made, and no endorsement

on it was required by any statute. 2. If there was an irregularity, it could only be reached by plea in abatement, and the defendants having pleaded to the merits, the irregularity was thereby waived.

II. The date of the note was *prima facie* evidence of the time when it was made, and if it in fact was made at a different time it was incumbent on the party insisting on it to prove it.

III. The demands offered as sets-off by the defendants below were not proper subjects of set-off in this action. The debt sued on was a *joint*, and not a joint and several debt, and in an action against two for a joint debt, a debt due from the plaintiff to *one* of the defendants, cannot be the subject of set off. 6 N. H. Rep. 27; 15 Maine Rep. 268; 6 Iredell, 338; 7 Smedes & M. 9; Cheves' L. R. 50; 5 Blackf. 37, 585; 2 Leigh's Rep. 493; 7 B. & C. 217; 18 Ala. 316.

IV. But if the demands sought to be set off were proper subjects of set off, the last two charges asked should not have been given, because those charges embrace *both* the demands alleged to have been paid by Johnson, and the bill of exceptions fails to show that the one last mentioned was paid *before* the commencement of the plaintiff's action, which was essential to make it a good set-off, 3 Ala. 256; and as the bill of exceptions is to be construed most strongly against the party excepting, and the court below had a right to refuse the charge as asking too much, this court cannot reverse.

PHELAN, J.—The motion to quash was properly refused. And even if it had not been, this court will not, in such a case, review the decision of the court below, on a motion to quash. If the party wishes to avail himself of the right to review the decision upon such objections, he must plead them in abatement.

The note itself was evidence of all it contained, and proved its own date, in the absence of stronger proof to the contrary, as much as its amount: and there is no difference in the rule in this respect, when husband and wife are sued on a note given by the wife when sole, from what it would be in any other case of suit on a note. The statute which makes the note proof, makes no distinction. Clay's Dig. 340, § 162.

The second charge requested by defendant embraces the proposition, that when a note is signed by two persons, the person signing his name first is to be presumed to be the principal and the other a surety. Although it most usually happens, that where one party to a note is principal and the other surety, the principal signs his name first, it would be altogether unsafe to establish such a rule as that for which defendant below contends, namely, that this shall be the presumption in all cases where there are more makers than one to a note or bond. Joint makers sign in the same way, and the old rule is the safe one that, in the absence of any thing to the contrary on the face of the note, all who sign shall be considered, not principal and surety, but joint makers. The facts that the plaintiff chiefly attended to business for his mother, and had but little property of his own at the time these notes were made, add nothing to the force of the other point, and create no such presumption in themselves. This charge was properly refused.

This brings us to the consideration of the last charge requested, and refused.

If plaintiff and his mother signed the notes, upon which judgments were afterwards recovered against the defendant Johnson, and he paid them or either of them before suit brought, he would be entitled to set off one-half of the amount so paid, against the demand of the plaintiff in this action. The plaintiff and his mother, in the absence of proof to the contrary, were joint makers of the notes, upon which these judgments were recovered, by the rule just stated above, and being such were liable to contribution as between themselves. When, therefore, defendant Johnson, as husband of Mrs. King, was compelled to pay these judgments, he would succeed to her right to claim contribution of the other joint maker, the plaintiff. He could have sued plaintiff for the amount and recovered, and it follows, that he would have the right to set off the amount in this action when sued by plaintiff.

Upon examining this request to charge, it will be found to lay down correctly the doctrine as to the right of contribution and of set off, but it proceeds to ask the court to instruct the jury, that defendant was entitled to set off *one-half of the*

amount paid by him on said judgments. Here the request was too broad. The proof would not justify such a charge. There was proof that he had paid *both the judgments*, but there was no proof that he had paid but one of them *before* plaintiff brought suit. To have given the charge as requested, would have been to instruct the jury that he could recover *one-half of both*, and this would not have been proper; and according to the principle settled in a multitude of cases, where the charge requested is not correct, taken as a whole, the court may properly refuse to give it.

There is no error, and the judgment below is affirmed.

STEPHENS *vs.* WESTWOOD.

1. When the Government of the United States has made an appropriation of land to an Indian reservee, under the treaty with the Creek tribe of Indians of 24th March, 1832, a patent subsequently issued by the Government cannot defeat the prior right of the Indian or his legal vendee.
2. But although the patent in such case may be void, on account of the previous appropriation of the same land to an Indian reservee, yet the fact of the previous appropriation cannot be proved by the bare recitals in another patent subsequently issued, so as to enable the junior grantee to recover against the older.
3. In trespass to try titles, where the plaintiff claims under patent from the United States Government to himself as the legal vendee of an Indian reservee under the treaty of March 24, 1832, and the defendant claims under an older patent from the Government, the plaintiff must prove the location of the Indian reservee, as well as that he succeeded to the rights of such reservee.

ERROR to the Circuit Court of Chambers.

Tried before the Hon. N. Cook.

This was an action of trespass *quare clausum fregit* brought as well to try titles as to recover damages from Stephens, the defendant, for his wrongful entry and detention of certain premises described in the declaration.

Upon the trial, the plaintiff produced a patent from the United States Government to himself, dated 10th December, 1845, for the land in controversy; proved possession in de-

fendant at and before the issue of the writ, and the value of the rents, and closed. This patent recites that the land conveyed by it was an Indian reservation, and that Seehecharche, one of the heads of families belonging to the Creek tribe of Indians, became entitled to it by virtue of the treaty made by the Government with that tribe on the 24th March, 1832; that said reservee, by the approbation of the President of the United States, had duly sold the same to Nat. Macon, Thornton & Co., who sold to G. E. Thomas & Co., who sold to the plaintiff, reciting the dates of these *mesne* conveyances.

The defendant below, who is the plaintiff in error, also claimed the land, and introduced two patents from the Government, one to himself, dated 1st May, 1838, and the other to William K. Stephens, for another portion of the land sued for, dated 5th April, 1837. It appears by the recitals in these patents that this land was sold under and according to the act of Congress of 24th April, 1820. Defendant below also proved that he had been in the possession of the land since 1836, and offered some proof conducing to show that the Indian's improvement was not upon the land in controversy; but this proof was rejected by the court, who charged the jury, that notwithstanding the defendant's patents were older than the plaintiff's, yet the recitals in plaintiff's patent showed an antecedent estate in the plaintiff and those under whom he claimed, and authorized him to recover the land from the defendant. To this charge the defendant below excepted, and among other things, which it is not material now to notice, assigns the same for error in this court.

Rice, for plaintiff in error.

The plaintiff in error, to support his claim to the land, read in evidence two patents, (one to himself, the other to his brother,) one dated 5th April, 1837, the other dated 1st May, 1838, both founded on a prior entry and certificate at the land office in Montgomery, and proved that he had been in possession of the land sued for since 1836; the patent subsequently issued for the same land to the defendant in error, bearing date 10th December, 1845, cannot, by its mere recitals, without any evidence *aliunde* of their truth, annul or destroy the prior patents to plaintiff in error.

Although the recitals in a patent may be evidence of the facts recited, as against "a mere stranger, showing no title whatever," (as intimated in Jones v. Inge, 5 Porter 336,) yet such recitals are not evidence (or, at all events, not sufficient evidence) of their truth, as against a senior patentee of the same land long in the actual possession of the land, to destroy and annul the older patent. Masters v. Eastis, 3 Porter 368.

The question in this case is, which patent is void? The senior patent is regular on its face. Whoever heard that a senior patent, regular on its face, could be defeated by the production of a junior patent to a different person, without proof *aliunde* whatever tending to show the invalidity of the senior patent?

In the case of Sally Ladiga v. Roland, 2 Howard (U. S.) Rep., the patents to the defendants were assailed by evidence *aliunde*, by parol evidence. Such was the course taken in the case hereafter cited in 7 S. & M. 363. Such evidence (parol evidence) is always admissible to show whether or not public officers have issued a patent for land forbidden by law to be entered or granted; because, whether they have done so or not, is a jurisdictional fact, which may always be shown by parol evidence. Of course such evidence *aliunde* is admissible for either party to assail the patent of his adversary. And the court should have allowed plaintiff in error thus to show the invalidity of the patent to defendant in error; the evidence offered being such as tended to that result. Doe ex dem. Strother v. Cuthey, 1 Murphey's Rep. 162; Hit-tuk-ho-mi v. Watts, 7 Smedes & Marsh 363.

To show that jurisdictional facts may always be proved or disproved by parol evidence, see index to the 3 vol. of Phillips' Evidence, title Jurisdiction.

All the exceptions taken are relied on.

ALLISON, *contra:*

1. The recitals in the patent, to the defendant in error, are conclusive of the facts as recited. 5 Porter's Reports, Jones and Parsons' Heirs v. Inge and Mardis' Heirs, page 327; 9 Ala. Rep., Crommelin v. Minter et al., 594.

2. The land was appropriated to the Indian by the location, and it was separated from the mass of public lands, and

it was not subject to sale by the United States. 13 Peters' Reports, Wilcox v. Jackson, 498; 9 Ala. Rep., Crommelin v. Minter, 594.

3. The patent to the plaintiff in error is void. 2 Howard's U. S. Rep., Ladiga v. Roland et al., 581; 9 Ala. Rep. 594.

4. The title of the purchase of an Indian reservee relates back to the contract. 16 Ala. Rep., Nolen & Thompson v. Heirs of Gwyn, 725.

CHILTON, J.—The charge of the court, as to the effect of the recitals in the junior patent, was clearly erroneous. It is true that if the Government of the United States had made an appropriation of the land in question to the Indian reservee under the treaty of 24th March, 1832, or it may be, that if the Indian actually had an improvement upon the land, and was the head of a Creek family, and resided on the land at the date of the treaty, and claimed it as his reservation, even though the Government had never recognized his claim, that in either case (and certainly in the case first supposed) the United States could not deprive the Indian reservee, or those who succeeded to his rights in accordance with the require- of the treaty, of the land in controversy; and that a patent, subsequently issued by the Government, could not defeat the prior right of the Indian or his legal vendee. Ladiga v. Roland, 2 How. U. S. Rep. 581; Wilcox v. Jackson, 13 Peters' Rep. 498; Crommelin v. Minter et al., 9 Ala. Rep. 594. In such case, the Government would have no title to the land granted, or having the *mere* title, would have no authority of law to disregard the previous appropriation and issue a patent to another person.

But although the older patent in this case may be void, because of a previous appropriation of the same land, by the Government, to the Indian reservee, this fact cannot be proved by the bare recitals in the subsequent patent, so as to enable the junior grantee to recover against the older.

In Johnson v. McGehee & Thomas, 1 Ala. Rep. 186, the plaintiffs, McGehee & Thomas, introduced the assignment of the Creek tribe of Indians to their grantors of the land sued for, the deed from such grantors to them, and a patent from the Government to their grantors reciting the previous loca-

tion of the land under this treaty, its sale by the chiefs, the approval by the President of such sale, and, in consequence of all which, the land was granted to the persons named in the patent. The patent was, however, issued by the United States after the action was brought, but if the recitals were allowed, as proof, it was clear that the plaintiffs, whose rights accrued before the patent issued, were entitled to recover. The court held that the recitals did not dispense with proof of the setting apart, or "location" of the land by the Government under the treaty, or that the assignment of the land by the tribe had been approved by the President. To the same effect is the case of Jones & Parsons' Heirs v. Mardis' Heirs, 5 Por. Rep. 327. As against a trespasser, these recitals would be received, if the action had been brought after the patent issued; but the defendant, in this case, occupies *prima facie* a very different stand in court. He has the highest evidence of legal title derived from the Government, the source of title, acquired many years anterior to the issue of the patent to the plaintiff below; and the Government cannot, by a recital in the subsequent patent that the former patent was void, render it inoperative. This would be the effect of these recitals; for, if they are to be regarded as evidence, they clearly show that the United States had, previous to the issue of the first patent, disposed of the land to the Indian reservee.

We think the plaintiff below, under the circumstances of this case, must prove the location of the Indian, as well as that he succeeded to the rights of the reservee. The mode by which this may be done is sufficiently indicated, by the decision in the case of Johnson v. McGehee & Thomas, Supra. See, as to the effect of recitals upon a previous grant, 1 Greenl. Ev. §§ 23, 24, and notes to third edition, in which the cases are collated.

Let the judgment be reversed, and the cause remanded.

BRANCH BANK AT DECATUR *vs.* McCOLLUM. DeGRAFFENREID *vs.* THE SAME.

1. Pending a trial of the right of property in slaves levied on under *fi. fa.*, whether such trial be by action of detinue, or by claim suit under the act of 1812, the lien of the plaintiff in execution continues, and its operation only is suspended.
2. The return of a sheriff on a writ of *fi fa.*, that "the property levied on was claimed by another, and not sold for want of indemnity," does not authorize the conclusion that he has parted with the possession of it; and unless he returns the property to the defendant in execution, or delivers it to the party claiming it, the lien of the execution continues.
3. Where a sheriff, having sold property under sundry executions, applies to the court out of which they issued, for directions how to appropriate the money, and several of the plaintiffs in execution except to the ruling of the court on such application, but one writ of error is allowable, to which all must be made parties.

ERROR to the Circuit Court of Franklin.
Tried before the Hon. S. C. Posey.

The sheriff of Franklin county made application to the Circuit Court to direct him how to apply certain moneys in his hands, arising from the sale of three slaves, which had been levied on and sold under sundry executions against James C. Kennerly. The several judgments on which these executions issued, may be thus described:

DeGraffenreid *et al.* commenced suit by attachment against said James C. Kennerly, on the 29th March, 1843, and on the same day caused their attachment to be levied on the three slaves, Robert, Joe, and William. By the sheriff's return on the attachment, the slaves were taken out of his possession by the coroner of the county, by virtue of a writ in his hands in an action of detinue instituted by James Kennerly and others, as trustees of Mrs. Kennerly. DeGraffenreid *et al.* obtained judgment in their attachment suit, at the March term, 1844, and immediately sued out a writ of *fi. fa.* on their judgment, which not being satisfied, they sued out other writs regularly after each term, until 1848, when the slaves were sold by the sheriff, the action of detinue having been decided against the claimants. Before the issuance of DeGraffenreid's attachment, the Branch Bank at Decatur had

caused a writ of *fi. fa.*, issued on a judgment in its favor against Kennerly, Bowen & Mays, to be placed in the hands of the sheriff of Franklin, who levied it on the three slaves above named, with others, and afterwards made the following return on it: "The property was claimed by the attorney of Mrs. Kennerly, the wife of J. C. Kennerly, and was not sold for want of indemnity." Another *fi. fa.* on the same judgment was immediately issued, and levied on the same negroes, on which the sheriff returned that the negroes had been taken out of his possession by the coroner, as above stated. Other writs of *fi. fa.* were irregularly issued on the same judgment until the sale.

Various other writs of *fi. fa.* in favor of the Branch Bank at Decatur, and other plaintiffs, against said Kennerly, came to the hands of the sheriff of Franklin, before the attachment of DeGraffenreid, and were levied on these slaves. But during the pendency of the action of detinue against the sheriff, none of the plaintiffs issued executions on their judgments regularly. The action of detinue was pending from May, 1843, to 1848.

In 1848, after the termination of the suit against the sheriff, writs of *fi. fa.* on all the judgments being in his hands, the sheriff sold the slaves, and the proceeds of sale being insufficient to satisfy all the executions, he applied to the court for instructions how to appropriate it. The court gave precedence to the execution of the Branch Bank at Decatur, first above described, which came to the hands of the sheriff on the 20th October, 1842. It then directed that the balance of the money should be applied *pro rata*, to the satisfaction of the several other *fi. fas.* which came to the hands of the sheriff before DeGraffenreid's attachment, viz: No. 1115 or 2500, Branch Bank at Decatur v. Kennerly, Bowen & Messenger, came to hand 25th January, 1843; No. 2636, William H. Crittenden v. James C. Kennerly, received 20th March, 1843; No. 2300, Planters' Bank of Tennessee v. J. C. Kennerly, received 28th March, 1843; No. 2250, Gorman v. Kennerly, received 28th March, 1843; Barton & Co. v. Kennerly, received 28th March, 1843.

DeGraffenreids excepted to the ruling of the court in allowing the other executions above named precedence over theirs,

and now assign it for error. The Branch Bank at Decatur, also, excepted to the ruling of the court in relation to the case "No. 1115 or 2500"

Each party sued out a writ of error, but by consent of parties the writ of error in the case of DeGraffenreid v. McCollum was dismissed, and the record made a part of the case of the Branch Bank at Decatur v. McCollum *et al.*

ORMOND & NICOLSON, for DeGraffenreid, contended:

1. That the Branch Bank at Decatur had lost its lien, by the execution being returned for want of indemnity. Otey v. Moore, 17 Ala. 280.

2. That all the antagonist executions had lost their liens, by not having been regularly kept up from 1844 to 1848, during the pendency of the action of detinue.

JNO. A. NOOE, for the Branch Bank at Decatur, contended:

1. That the execution in favor of the Bank, to which the court gave priority, was entitled to precedence over all the others. It was not necessary to issue executions regularly during the pendency of the action of detinue. 2 Stew. & P. 390; Clay's Digest 317, §32.

2. That the failure to indemnify the sheriff, as shown by his return, did not postpone the lien of the execution. Clay's Digest, 209, §44; 3 Ala. 493; 10 Smedes & M. 184.

3. That the other execution in favor of the Bank, No. 1115 or 2500, was entitled to priority over all the other executions with which it was placed on an equality, because it first came to the hands of the sheriff.

LIGON, J.—It is contended, on the part of B. & F. DeGraffenreid, that they are entitled to the satisfaction of their judgment before the other execution creditors of Kennerly, because, pending the action of detinue for the trial of the right to the slaves levied on by the sheriff, they caused writs of *fi. fa.* to be regularly issued on their judgment, and the other creditors did not. We cannot give our assent to this proposition; on the contrary, our opinion is, that so far as the slaves sought to be recovered in the action of detinue are concerned, a regular re-issue of writs of *fi. fa.* was not necessary, to continue the lien of those creditors whose executions had been

already levied upon them. Pending that suit, the liens continued as they were at its commencement, and their operation only was suspended.

To this effect is the case of Mills v. Williams *et al.* 2 Stew. & P. 390. In that case, the proceeding by which the operation of the lien of Williams was suspended, was a claim suit under the act of 1812. In this, the suspension resulted from an action of detinue, in which the plaintiffs obtained possession of the slaves by executing the bond required by the statute. There is no difference, however, between the two methods of proceedings, so far as they affect the lien of the execution creditors.

It is also insisted, that B. & F. DeGraffenreid should have been preferred to the Branch Bank at Decatur, so far as the money arising from the sale of the slaves, Bob and William, is concerned. They predicate this claim upon the following facts: These slaves were levied upon by the sheriff, under a *fi. fa.*, in favor of the Branch Bank at Decatur against James C. Kennerly, several days before the attachment in favor of DeGraffenreid was issued, or levied. On the *fi. fa.* thus levied, the sheriff made a return in these words: "The property was claimed by the attorney of Mrs. Kennerly, and not sold for want of indemnity." The fair and, indeed, the only legitimate interpretation of this return is, that the sheriff still retained the possession of the slaves, on which he had made the levy, but demanded indemnity before he would sell, which had not been given at the date of his return. This view of the return brings this branch of the case directly under the rule laid down by this court, in the case of Pickard *et al.* v. Peters, 3 Ala. 493, in which it is said, "when the sheriff demands a bond of indemnity from the plaintiff, which is not given, he may deliver the property levied on to the person from whose possession it was taken, *but if he does not do so, but retains it, the lien continues.*"

This case is clearly distinguishable from that of Otey v. Moore, 17 Ala. 280, in which it was held, that the lien of an execution creditor should be postponed, in favor of the rights of a purchaser for valuable consideration. In that case, the sheriff required indemnity, which was not given, and he *re-delivered* the slave to the defendant in execution, returned the

writ of *fi. fa.* into the court out of which it issued, and before an *alias* was sued out Moore became the purchaser of the slave. In this case, from all that appears in the record, the sheriff did not part with the possession of the slaves after the levy, until they were taken from him by the coroner, by authority of the writ in detinue. Thus far, we can see no error in the judgment of the Circuit Court.

But the court below, after directing one of the executions in favor of the Branch Bank at Decatur to be fully paid, proceeds to direct that the remainder of the money in the hands of the sheriff be paid *pro rata*, to the *fi. fa.* numbered 1115 or 2500, in favor of the Branch Bank at Decatur, and the *fi. fas.* in favor of the Planter's Bank of Tennessee, William H. Crittenden, Barton & Bro. and M. Gorman. In this the court below erred; for the execution of the Branch Bank at Decatur, thus placed on an equality with the others, appears to have come to the hands of the sheriff nearly a month before that of Crittenden, and more than two months before the others with which it was classed, and there is nothing in the record to show that the priority of lien thus obtained was ever lost or impaired.

By the consent of the parties, the writ of error in the case of B. & F. DeGraffenreid against McCollum *et al.* is dismissed, and the record brought up under it is made a part of the case of the Branch Bank at Decatur against McCollum *et al.* in this court. In cases like the present, but one writ of error is allowable, in which all the parties below must be made parties to the record here.

For the error pointed out above, the judgment of the court below must be reversed, and the cause remanded.

HALL, ADM'R, *vs.* HUDSON, ADM'R.

1. A paper purporting to be a decree on the final settlement of an estate, signed by the Judge of the Orphans' Court and filed among the papers of the cause, with the endorsement thereon, "Decree in Est. of J. H. deceased, filed 2d Monday, April, 1847," also signed by the judge, is not the judgment of the court until entered of record.

ERROR to the Court of Probate of Tuskaloosa.

On the final settlement of the estate of James Hudson, deceased, which was had at a special term of the Orphans' Court of Tuskaloosa County, on the second Monday in April, 1847, the presiding judge made out his decree of distribution, in which he decreed four hundred and seventeen dollars to the administrator of James Hudson, Junr. This decree was signed by the judge, and endorsed, "Decree in Est. of James Hudson, deceased. Filed 2d Monday April, 1847," (the endorsement also being signed by him,) and filed among the papers of the cause in the office of the clerk; but no entry of record in relation thereto was made. On the 12th of July, 1850, a *scire facias* issued in favor of the administrator of James Hudson, Junr. alleging the rendition of the decree, and that no execution had issued thereon, and calling on the administrators of James Hudson, Senr. to show cause why execution should not issue. The defendants appeared, and pleaded "nul tiel record" to the *scire facias*, and judgment was rendered for them. The facts as to the decree not being recorded, &c. appear from a bill of exceptions which was taken on the trial.

P. & J. L. MARTIN, for plaintiff in error:

The only question presented in this case arises upon the construction of the statute to be found in Clay's Digest, 304, §§ 42, 37.

We contend that the decree rendered in the case by the Judge of the Orphans' Court, is complete, as here presented; that the requisition upon the clerk to enter it upon the record, can have no effect whatever upon its validity, whether performed or not. The section is directory to the clerk.

ORMOND & NICOLSON, for defendants:

What is a judgment? It is the mind or determination of the court, audibly expressed, and recorded by the appropriate organ of the court, and when so recorded imports absolute verity. It follows necessarily, that until it is so recorded it is not a judgment. There cannot, at common law, be a court of record without this ministerial officer to register its determinations, and when so registered they become records.

3 Black. Com. 24; 6 Bac. Ab. title Scire Facias; 2 Saunders, 71, marginal note 2, which shows that scire facias will only lie upon a judgment.

It is true, that by statute the judge is in some instances also the clerk of the court, but that does not change the principle in the slightest degree, nor supersede the necessity of the registration of the decision. In such cases the judge acts in both capacities, and in such cases the recording of the opinion or decision of the court is just as necessary to constitute a judgment as if the offices were held by different persons.

What, then, is called the judgment in this case? It is a mere written statement of the judge, signed by him, on a loose paper, without any registration or recording thereof, or any minute, note, or memorandum made of it on any of the books of the office. And this paper, without any authentication further than is evidenced by the paper itself, because, nearly four years afterwards, it is found in the file of papers of the cause of which it purports to be the judgment, is called the judgment of a court of record. This is not such a solemn act that an execution can issue thereon to deprive a citizen of his property.

2. We have stated the common law idea of a court of record, in exact conformity to which is the statute creating this court. A clerk is provided for the court, whose duty is to enter "all orders and decrees made by the court," Clay's Digest, 297, § 2; and until this is done, neither at common law nor under this statute, is there any judgment or decree of the court upon which process can issue. We admit that a judgment or decree imperfectly entered, or omitted to be entered by the clerk, where the evidence of the rendition of the judgment exists in an authentic form, may be rendered *nunc pro tunc*. But the question here is not to amend the judgment or enter it *nunc pro tunc*, but to revive it, that is, we are called on to show cause why the party should not have execution of his judgment.

GOLDTHWAITE, J.—The legal issue upon the plea of nul tiel record was, in the opinion of the court, correctly determined. The Orphans' Court was a court of record, and the entry of the judge, however full it might be, did not be-

come the judgment of the court until entered of record. 3 Blackstone's Com. 24. The statute (Clay's Digest, 304, § 42) was not intended to alter this rule, but to authorize the issue of executions against an executor or administrator for the amount decreed, after it had become the judgment of the court, as in case of judgments at law.

We do not, by this decision, determine that a judgment of the Orphans' Court can be revived by *scire facias*, understanding the counsel to waive all other points than the one determined.

The judgment is affirmed.

CROSBY *vs.* BRANTLY.

1. When a judgment by default is rendered in the Circuit Court on an appeal from the judgment of a Justice of the Peace, and the cause of action is an open account for a less sum than twenty dollars, the record must show that proof was made to the court of the correctness of the demand; and if it does not, the judgment will be reversed.

ERROR to the Circuit Court of Conecuh.

Tried before the Hon. Robert Dougherty.

WATTS, JUDGE & JACKSON, for plaintiff in error.

No counsel for defendant.

PHELAN, J.—The action below was on an open account, for a sum less than twenty dollars, and was brought to the Circuit Court by appeal. The judgment was by default, and the record does not show that any proof was made to the court of the correctness of the demand. This was an error, as this court has expressly decided, in Kenum v. Henderson, 6 Ala. 132, and Witherington v. Brantly, 18 ib. 197.

The judgment is reversed, and the cause remanded.

POE, SHERIFF *vs.* DORRAH.

1. The interest which will disqualify a witness from testifying must be some legal, certain and immediate interest in the result of the suit itself, or in the record thereof as an instrument of evidence to support his own claims, or to protect him from an admitted liability.
2. The payment, by the sheriff, of a judgment recovered against himself, for his failure to make the money on an execution, is not a satisfaction of the original judgment, unless the defendant adopts the payment, and insists upon it as a satisfaction of the judgment against himself.
3. The surety on a replevin bond, which has been returned forfeited, is a competent witness for the plaintiff in an action against the sheriff for failing to make the money on the execution.
4. If the sheriff pays off and discharges the judgment against himself, and the surety on the forthcoming bond insists on such payment as a satisfaction of the judgment on which he has become liable by reason of the forfeiture of the bond, he thereby becomes liable to the sheriff for money paid for his use.
5. Secondary evidence of the contents of an execution is admissible, upon proof that it has been returned to the clerk's office, and that diligent search has there been made for it, both by the clerk and the party's attorney. The presumption of its loss being onec established will continue, until there is some evidence that it had been found since the search.
6. The release by the plaintiff of his own property, which had been levied on as the property of the defendant in execution, does not discharge the sheriff from liability, for not making the money out of property which really belonged to the defendant.
7. Nor can the sheriff claim to be discharged from liability, because the plaintiff releases a levy on property to which a claim is interposed by a third person, and bond given to try the right of property according to the statute.

ERROR to the Circuit Court of Fayette.

Tried before the Hon. William R. Smith.

This was a proceeding, by motion, against the sheriff of Fayette to recover of him the amount of an execution issued in favor of Elizabeth Dorrah against Thomas J. Parkenson, upon the suggestion that he could have made the money by proper diligence. Upon the trial, it appeared that an attachment had been issued at the suit of the plaintiff against Parkenson, and levied on certain property, which was replevied by giving bond with one Warbington as security for its delivery. It further appeared that judgment had been rendered in the attachment suit, and execution had been issued thereon, which was returned "no property found." The re-

plevy bond was then returned forfeited. To fix the liability of the sheriff, the plaintiff introduced the testimony of Warbington, the security on the replevy bond; the sheriff objected to his competency as a witness on the ground of interest, but his objection was overruled, and he excepted. The execution itself, which was issued on the judgment rendered in the attachment suit, was not produced, and to lay the foundation for secondary evidence, the plaintiff proved by her attorney that about two years before the trial, he and the former clerk of the court had diligently searched the office, and it could not be found, and then offered to read the execution docket, showing that the execution was issued on the 24th of May, 1842, and had been returned by the sheriff with his return endorsed theron, prior to the time the search for it was made. To this evidence the sheriff objected, but his objection was overruled.

It was also in proof that the sheriff had levied the execution on land in the possession of Parkenson, of value sufficient to satisfy the judgment, but that this levy was discharged by order of the plaintiff, as she claimed it as her own, and, upon the trial of this motion, introduced a deed tending to show that it was hers. It further appeared, that subsequent to the return of the original execution, upon which this motion is founded, an execution had been issued on the replevy bond against both Parkenson and Warbington, which was levied on personal property, but it was claimed by a third person, and affidavit made for the purpose of trying the right of property, but the plaintiff also released the levy on this property; the testimony of Warbington tended to prove, that the sheriff could have made the money on the original execution against Parkenson by proper diligence.

Upon this testimony the sheriff requested the court to charge the jury, that the discharge of the levy made upon the land by the plaintiff, and the subsequent acts of returning the bond forfeited, and the issuance of an execution on said bond, discharged him from liability, which the court refused to give; other instructions were prayed, which were refused, but it is not material to state them.

P. & J. L. Martin, for plaintiff in error.

1. Warbington was directly interested, and should not have been allowed to testify. 18 Ala. 659; 14 ib. 244; 11 ib. 659.

2. The proof made of the loss of the execution was not sufficient to let in secondary evidence of its contents; and the mode of proving its contents was not sufficient.

3. The issuance of a second execution on the forfeited bond waived the claim, if any, on the first against the sheriff.

4. The release of the levies discharged the sheriff.

5. The course of the plaintiff in error was proper under the statute, after the land levied on was released, in demanding the property attached. If the defendant in error intended to rely on the liability of the sheriff, for failing to make the money on the first execution, she ought to have prevented the issuance of the second. The lapse of time between the return of the execution and the making of this suggestion is proper here to be considered. See 16 Ala. 130.

E. W. Peck, *contra.*

1. The deposition of the witness, Warbington, was properly admitted. To exclude a witness on the ground of interest, he must have a certain and direct interest in the event of the cause, or an interest in the record for the purpose of evidence. 1 Starkie Ev. 20; 3 Porter 433; Gould v. James, 6 Cowen 369. It is not sufficient that he is interested in the question merely. The verdict must establish something in his favor or against him. 3. U. S. Digest, page 688, § 42, and the cases cited, particularly Harraise v. Maxwell, 5 Halsted's Rep. 297. In this case, the witness, in contemplation of law, had no interest either in the record or the event of the cause; whether the defendant in error succeeded or failed in her motion against the plaintiff in error, the liability of the witness would remain the same. Moony & Black v. Parker, 18 Ala. 708, and the cases cited.

2. On the question raised on the admissibility of the execution docket, I insist, 1st. That was evidence, without accounting for the loss of the execution; but 2d. If it was not, the evidence of its loss was sufficient to let in the execution docket as secondary evidence. Mordecai v. Beal, 8 Porter 535; Swift v. Fitz Hugh, 9 Porter 39; Jones v. Scott, 2 Ala. Rep. 58; Sturdevant v. Graves, 5 Ala. Rep. 435.

DARGAN, C. J.—We will consider the questions raised in this case in the order in which they were made at the bar. First, was Warbington a competent witness for the plaintiff? The rule is now recognized by all courts professing to be governed by the common law, that the interest which will render a witness incompetent to testify, must be some legal, certain, and immediate interest, in the result of the suit itself, or in the record thereof as an instrument of evidence to support his own claims, or to protect him from an admitted liability. Greenl. Ev. Vol. 1, § 386; Moore and Jones Adm. v. Henderson, 18 Ala. Rep. 232. If the interest be not of this character, but, on the contrary, be remote or contingent, and not certain and immediate, the witness is competent to testify, and such remote or contingent interest will go to his credibility, but not to his competency. This general rule all admit, and it is in the application of it to particular cases, that the conflict of opinion in the judgment of courts is to be found. This conflict, however, does not impair the rule, and we must test each and every case by it.

The facts of this case show that Warbington was liable to the plaintiff as the security of Parkenson, for the same debt for which the sheriff is sought to be charged for his neglect. But the judgment that was recovered against the sheriff, for his neglect to make the money on the execution against Parkenson, *within itself could not operate as a satisfaction* or discharge of the liability of the witness. Something else must be done besides the mere recovery. It must be paid, and the defendant in the execution, *under our decisions*, must insist *upon such payment, as a satisfaction*, thus recognizing it *as a payment* made for his benefit and at his request. Rutland's Adm. v. Pippin, 7 Ala. Rep. 419; Roundtree v. Weaver, 8 Ala. Rep. 314; 13 Ala. Rep. 357; Mooney and Black v. Parker, 18 Ala. Rep. 708. These authorities hold, that if a sheriff shall pay the amount of an execution, to discharge himself from liability for neglect in not making the money, the defendant may avail himself of such payment to have the judgment satisfied, but he thereby becomes liable to the sheriff for money paid for his use. Whether, then, the payment by the sheriff of the judgment against him, for his omission to make the money, would ever be a satisfaction of the judgment

against the original defendant, does not depend exclusively upon the mere payment by the sheriff of the judgment against him, but upon the further fact, whether the defendant in execution will so consider it, and thereby adopt it as his own; for if he does not, the judgment against him remaining unsatisfied may be enforced.

To this extent we have been driven by the decisions of our predecessors, and whether right or wrong, we must abide by the rule they have thus established. Perhaps it would have been better, to have held that the payment by a sheriff to discharge himself from liability, for failing to make the money on an execution, could not be invoked by the defendant in the execution, as a satisfaction of the judgment against him. But the law is settled otherwise. Admitting, then, that the defendant in execution may insist on such payment as a satisfaction, and thus render himself liable to the sheriff for money paid, will he do it? *That is uncertain, it is contingent.* Neither, therefore, the rendition of judgment against the sheriff, nor his subsequent payment of it, within themselves, and without more, would discharge the witness from his liability; it requires another voluntary act to be done by the defendant in execution, which he may or may not do, at his election. Whether, therefore, the liability of the witness would ever be discharged by the proceedings against the sheriff, depends on a contingency, and consequently he was legally competent to testify.

It may, however, be said, that the witness himself might insist upon the payment made by the sheriff, as a satisfaction of the judgment which he had become liable to pay by reason of the forfeiture of the bond on which he was security. To this we should answer, that if he could, he would thereby adopt such payment as his own, and become immediately liable to the sheriff for money paid for his *use.* His interest, therefore, even in that point of view, would be balanced. We are not, however, to be understood as deciding that a security upon a forthcoming bond can adopt the payment made by a sheriff in discharge of his liability for neglect, and thus have the judgment against the original defendant satisfied. All we intend to say is, if that could be allowed, under the decisions we have referred to, he would be considered as

adopting for his own benefit the payment by the sheriff, and therefore would be responsible to him for money paid. In no point of view can we see that the witness was incompetent from interest.

2. In regard to the admission of the secondary evidence of the contents of the execution, the court did not err. The execution was returned to the clerk's office before the search was made for it; and it was proved that diligent search was made for it, both by the clerk, who is the keeper of the records, and by the plaintiff's attorney. The presumption is that it was then lost, and of course this presumption would continue, until there was some evidence that it had been found since the search was made. The cases of Jones v. Scott, 2 Ala. 59, and Sturdevant v. Graves, 5 Ala. Rep. show that the predicate for letting in the secondary proof was entirely sufficient.

3. In reference to the instructions prayed by the defendant, it is enough to say, that they were properly rejected. A plaintiff in an execution surely has the right to order his own property to be released, if the sheriff levies upon it as the property of the defendant. Nor can this discharge the sheriff from his liability, for neglect in not making the money out of property which in fact belongs to the defendant. Nor can the sheriff claim to be exempt from liability, because the plaintiff releases a levy on property claimed by a third person, and who interposes his claim to try the right of property. The plaintiff may know the claim is just, or be unwilling to enter into a controversy about it. He has the right to release a levy so made, but the exercise of this right within itself cannot absolve the sheriff from liability for his own neglect in not making the money, especially when the liability by the sheriff had been incurred long before such levy was made.

We can perceive no error in the record, and the judgment must be affirmed.

SCOTT *vs.* COXE'S ADM'RS.

1. When the admissibility of evidence depends upon the existence of a preliminary fact, it is the duty of the presiding judge to decide the question of its existence, though he may, if he chooses, take the opinion of the jury upon it.
2. The fact that the plaintiff was frequently seen to purchase groceries from the defendant, who was the only grocer in the village, does not warrant the presumption that he purchased his entire supply from him, so as to authorize proof of the amount of groceries necessary for his family, or actually consumed by them, during the time such purchases were being made.
3. The fact that a merchant, or grocer, employs no clerk, furnishes no reason for dispensing with the ordinary rules of evidence in proving his accounts.

ERROR to the Circuit Court of Chambers.

Tried before the Hon. Robert Dougherty.

Assumpsit by the defendants in error against Scott, to recover upon certain promissory notes made by him to their intestate. On the trial, Scott attempted to establish an indebtedness of the intestate to him for articles of provisions, liquors, &c., sold by him to the intestate in his life time. The proof on this point, as disclosed by a bill of exceptions taken at the trial, was, that Scott, about the 17th April, 1848, commenced keeping a family grocery, and selling such articles as sugar, coffee, flour, salt, cheese, raisins, liquors, spices, and all other articles of provisions usually kept in a family grocery of the kind; that he sold usually on a credit of twelve months to solvent purchasers; that the intestate resided in the village in which this grocery establishment was kept, but died on 22d February, 1850; that from the first of April, 1848, until the first of February, 1850, the defendant Scott was the only person in the village of whom such articles could be purchased, except for a portion of the year 1848, during which time there was another similar establishment in the same village. It was shown that during this time the intestate was seen to buy groceries, almost daily from the defendant below at some times, and at other times not so frequently; that he bought sugar, salt, flour, coffee, liquors, and many other articles for family use, but the witness who proved this did not know the amount or value of such articles; that the intestate's family then consisted of himself, his

wife, four children and two slaves; that he lived in good style, and frequently had company at his house, and frequently gave parties. It was proved also that Scott had no clerk, but kept his own books, and carried on in the same house the business of retailing ardent spirits by license; that the intestate drank a great deal, and frequently bought liquors for himself and to treat his friends with, and would sometimes throw down a dollar on such occasions and take some drinks and go off, saying he would call and take out the balance. It is recited by the bill of exceptions, that at this stage of the proof, the defendant offered to prove, by a witness who lived very near the intestate, and who was acquainted with the size of his family and mode of living, how much sugar, coffee, flour and salt, according to the judgment of the witness, it would require to supply the wants of the intestate and his family per month in the latter part of 1848 and the year 1849. This evidence the plaintiffs moved to reject, and the court sustained the motion.

The defendant then offered by the witness aforesaid to prove how much of the above articles of provision the intestate and his family consumed during the year 1849, and this was rejected by the court as illegal. The rejection of this evidence is the matter assigned for error.

Samuel F. Rice, for plaintiff in error.

1. When it is proved that the owner of a family grocery has furnished a person for a definite period with family groceries, and that the owner of the grocery had no clerk during the time, and that the family of the person so furnished with such family groceries consisted of himself, his wife, his four children and two slaves, &c., &c., &c., and when there is no direct or positive proof of *the quantity* of the articles so bought from such grocery, the law will permit a witness who *lived very near* to the purchaser of such articles during the period whilst the purchaser was getting the articles, and *who knew his mode of living, and the size of his family*, to state to the jury *how much* of such articles, according to the judgment of the witness, it would require to supply the wants of such purchaser and his family per month.

And the law will also permit such witness to state to the

jury how much sugar, coffee, salt and flour, according to his judgment, such purchaser consumed for the use of his family in the year 1849, especially after it had been proved, in addition to the above facts, that there was no other family grocery in the town where all the parties resided in the year 1849, and that the purchaser was seen by witnesses buying groceries at this only grocery almost daily, &c., and that the purchaser himself is dead.

If such evidence is rejected, how can a grocer, who has no clerk, and sells on credit, ever prove his account after his customer dies? Such a case does not admit of higher or better evidence or more satisfactory proof, than was offered and rejected in the present suit. Rembert et al. v. Brown, 14 Ala. Rep. 365, and cases there cited; Chenault v. Walker, 14 Ala. Rep. 151; Com. v. Thompson, 3 Dana, 301.

No counsel for the defendants.

CHILTON, J.—The court properly rejected the evidence offered. If admissible in any aspect, it could only have been received upon the hypothesis that all the articles which were consumed by the intestate and his family, or which were required to supply the family, were purchased of Scott, during the period when the intestate was in the habit of making purchases. The proof which was rejected, depending for its legality upon this preliminary fact, it was for the court to determine whether the fact upon which it depended was established. "It is the province of the presiding judge," says Greenleaf, "to determine all questions on the admissibility of evidence to the jury, as well as to instruct them in the rules of law by which it is to be weighed. Whether there is any evidence or not, is a question for the judge, but whether it is sufficient, is a question for the jury. And if the decision of the question of admissibility depends on the decision of other questions of fact, these preliminary questions of fact are first to be tried by the judge, though he may, if he chooses, take the opinion of the jury upon them." 1 Greenl. Ev. § 49.

It is not sufficient that there may be some evidence tending to prove the preliminary fact; it must be established to the satisfaction of the court by competent proof. In the case before us it was not proved; and the court would be wholly

unwarranted in concluding, that because the intestate made *frequent* purchases, he bought of the defendant his *entire* supply. Such a conclusion would be an obvious *non sequitur.* Yet it is upon this assumption that the proof offered would depend for all its force; since, if the intestate's estate is not to be charged with all the provisions and liquors that the family consumed, or which were required for consumption, the amount of the indebtedness, as deducible from the quantity and value of the articles furnished, is left as uncertain as before the proof was introduced.

The fact that the defendant below kept no clerk, cannot affect the admissibility of this evidence. To decide that it is admissible on this ground, would be to hold out a premium for persons to dispense with the ordinary means of proof; for, if this proof under the circumstances in this case be legitimate, it might often turn out that the shopkeeper would recover for articles which others have furnished, or recover, not for articles actually purchased, but for what the party ought to have procured had he properly provided for his family. A rule which would lead to such consequences could not be tolerated.

The cases cited do not sustain the proposition contended for by the counsel, but are altogether consistent with the views we have above expressed, which we think are supported by several decisions of this court.

In Grant v. Cole & Co. 8 Ala. 519, it is said, "there can be no doubt that a merchant's account, like any other fact, may be established by circumstantial evidence, but these circumstances must not be remote or far-fetched, but such as afford a reasonable presumption of the fact attempted to be deduced from them." In that case it was held, that proof that the plaintiffs and their clerks kept correct books, and charged promptly all articles purchased at the store, did not warrant the inference that the particular account was correct, and that such a presumption from the fact was a mere conjecture. The same was said as applicable to proof "that the goods charged were suitable to the wants of the family of the defendant, and that he traded considerably with the plaintiffs, and was frequently at their store." See also to the same point, Hale et al v. Brown, 11 Ala. Rep. 87, 95; Barker v. Sample, 6 ib. 255.

It sometimes happens, that from considerations of public

convenience and necessity, the rules of evidence as to the admissibility of proof are relaxed when applied to a particular class of cases, which, from their peculiar circumstances, are regarded as constituting exceptions to the general rule; but the case before us falls within none of these exceptions.

Let the judgment be affirmed.

HINSON *vs.* WALL.

1. A mere memorandum of the clerk stating the amount of damages assessed by the jury, with the words, "then judgment for" the sum so found, added, does not constitute a judgment on which an action of debt can be maintained, although the clerk certifies, in proper form, that it is "a true and perfect transcript and exemplification of the record."
2. The proceedings of the courts of the several States composing the United States, will be presumed to be governed by the common law, until the contrary is shown.

ERROR to the Circuit Court of Lowndes.

Tried before the Hon. E. Pickens.

Wall brought debt against Hinson, on the record of Anson Circuit Court in the State of North Carolina, to which Hinson pleaded *nul tiel* record, and other pleas.

On the trial in the court below, the plaintiff offered in evidence a record duly certified, in which the judgment entry in the Circuit Court of Anson county, in North Carolina, is in these words: "The following jury was sworn and empannelled (here follow twelve names,) who find all the issues in favor of the plaintiff, and assess his damage to five hundred and eighty-five dollars; then judgment at September term, 1844, $585; the costs arising in this suit, due to the county, to witnesses, and officers of court, is $134 92." The clerk of that court certifies that the record in which this entry appears, is "a true and perfect transcript and exemplification of the record," &c. The judge's certificate, conforming to the requisition of the act of Congress, is also attached.

To the reading of this record as evidence of a judgment

against him, the defendant, by his counsel, objected, but his objection was overruled, and he excepted.

The defendant requested the court to instruct the jury, that the judgment entry contained in the record, with the certificates, (which were admitted to be regular,) was not sufficient of themselves to authorize a recovery in this case; which the court refused, and instructed the jury that the record and judgment entry, with the certificates, were sufficient to authorize a recovery, without further proof. To the refusal of the court to charge as requested, and to the charge given, the defendant excepted, and the case is brought here for revision on writ of error.

ELMORE and BOLLING, for plaintiff in error:

The court erred both in admitting the record as evidence, and instructing the jury that the record and judgment entry and agreement were sufficient to authorize a recovery without further proof. Tombecbee Bank v. Strong's Ex'r. 1 S. & P. 187; same Bk. v. Godbold, 3 Stewart, 240.

The pleadings of plaintiff below allege there was a judgment in North Carolina for $719 $\frac{92}{100}$. The defendant below alleged by plea that there was no such record. If this court should be of opinion that the judgment entry is sufficient as to the amount found by the jury, there is certainly no judgment for the cost, and the jury only certify $585; and unless there is a judgment for the cost, the court instructed the jury erroneously, and also erred in admitting the record as evidence. If the record was offered as evidence only of a judgment for $585, the plaintiff should have disclosed that to be the purpose for which he offered it. Kenan v. Holloway, 16 Ala. Rep. 61. If the record was evidence, the charge of the court was too broad. Under the pleadings, the special instructions, if any was necessary, should have been asked by plaintiff below.

Included in the judgment, if there is any, is the clerk's charge for the transcript and his seal, and called by him costs. There is no judgment, but only a memorandum of the clerk.

GEO. W. STONE, for defendant in error:

1. The judgment entry is sufficient. It contains the par-

ties litigant, the verdict, and the amount of the judgment. These are the only facts which the judgment need show.

2. Each State has the right to determine its own forms of pleadings and judgments. If the record shows who were the parties, that a verdict was rendered, and the amount of the judgment, and the certificate conforms to the act of Congress, our courts are bound to accord to it absolute verity. Crawford v. Simonton, 7 Porter, 110; McRae v. Stokes, 3 Ala. 401; White v. Strother, 11 ib. 720. The act of Congress makes the certificates supply the place of evidence, and they prove the proceedings to be in due form, and that the court had jurisdiction. Several of the decisions cited below hold, that this court will *ex officio* take notice of the laws and forms of judicial proceedings in other States. Could not a recovery be had upon the record of a judgment from Louisiana, or New York, or any other State where the common law has been abolished or changed, without any other proof than that afforded by the certificates. Could not a recovery be had upon a judgment recovered in a statutory action; as in our trials of the right of property; or summary proceedings against officers? 5 Litt. 350; 4 Cowen's R. 296; 1 Johns. Cases, 238; 9 Cranch, 122; 7 ib. 48; 13 Serg. & R. 362.

3. The exceptions raise only the plaintiff's right to recover. No point is made by the record as to the amount of the recovery to which he is entitled. Nor is any discrimination made between the different items which constitute his demand.

LIGON, J.—The court below erred in allowing the record to go to the jury, as evidence of a judgment for the sum claimed in the declaration, against the objection of the defendant. The plea was *nul tiel record*, and the paper offered, although regularly certified, contains no judgment against the defendant in the suit in North Carolina. That which purports to be a judgment, is, at most, but a memorandum of the clerk, and not the solemn act of the court, which finally declared and adjudged the rights of the parties in the suit to which it pertains. Tombecbee Bank v. Godbold, 3 Stew. 240.

It is insisted, however, that this may be the form in which judgments are regularly entered in the courts of North Caro-

lina, and if such entry would be effectual there as a judgment, the same force and effect should be allowed to it in this State. We are not inclined to deny the proposition, that a judgment, good in a sister State, would be good here; but, until the contrary appears, we must hold that the common law prevails in North Carolina, and thus holding, we cannot do otherwise than conclude that, the entry recited in the exemplification, offered in evidence in this case in the court below, is not a judgment of the court.

If the memorandum in the record is, in fact, regarded as a good judgment entry in the State of North Carolina, it might be so averred in the declaration, and the laws or practice of that State would be evidence, when rightly presented, to establish it.

The court not only erred in allowing the record to go to the jury, but also in refusing the charge asked, and giving the one excepted to.

Let the judgment be reversed, and the cause remanded.

LEE *vs.* HOUSTON, ADMR.

1. The Circuit Courts have authority, under the statute of 1824, (Clay's Digest 322, § 55,) to amend a judgment at any time within three years after its rendition, by the correction of any clerical error or mistake, where there is sufficient matter apparent on the record to amend by.
2. A *remittitur* of the damages recovered in an action of assumpsit having been entered by mistake, the judgment was set aside at the next term of the court, on the motion of the plaintiff, and plaintiff then dismissed his suit; and at a subsequent term, the latter judgment was amended *nunc pro tunc*, so as show that the defendant had appeared and consented to the vacating of the first judgment. *Held*,

   That the appearance and consent of the defendant to the vacation of the judgment must be considered as a waiver of the proof required by the statute, or as a judicial admission of the facts necessary to authorize the court to set aside the judgment.

ERROR to the Circuit Court of Sumter.
Tried before the Hon. George Goldthwaite.

In this case a judgment was rendered in favor of the de-

fendant in error against the plaintiff in error, at the Fall Term, 1848, of the Circuit Court, for five hundred dollars damages, with a *remittitur* of the damages. At the Spring Term, 1849, a motion was made by the plaintiff in the judgment to set it aside, on the ground that a *remittitur* of the damages had been entered through mistake, or misapprehension, when in fact no part thereof had been paid or satisfied. On this motion the judgment rendered at the Fall Term, 1848, was vacated, and the plaintiff then dismissed his suit. At the Fall Term, 1851, the judgment rendered at the Spring Term, 1849, was amended *nunc pro tunc*, so as to show that the defendant had appeared and consented to the vacating of the first judgment.

R. H. Smith, for plaintiff in error.

The Circuit Court had no jurisdiction to make the order revoking the judgment of the previous term; nor the one *nunc pro tunc*.

Its powers do not, at common law, extend to amending judgments after the term at which they are rendered, Armstrong v. Robertson & Barnwell, 2 Ala. 168–9; nor can the Circuit Court, by statutory power, do more than to amend its process and pleadings before final judgment, or after judgment do more than amend any clerical error, when there is sufficient matter apparent on the record to amend by. Same authority, page 169–70.

The judgment setting aside that of the previous term, and assigned as error, was not for a clerical error, nor was there any thing to amend by. It was an act in reference to a subject matter of which the court had no jurisdiction. If it was unauthorized, the judgment *nunc pro tunc* cannot aid it, for consent cannot give jurisdiction. State of Rhode Island v. Massachusetts, 12 Peters 719, 20; Grignoni v, Aston, 2 How. U. S. Rep. 319; Wyatt v. Judge, 7 Port. 37, 38; Cullum v. Casey & Co., 1 Ala. 351; 1 Scam. 249; 2 Porter 345.

Even conceding, for argument, that consent could give jurisdiction, it was only a consent to do what the motion asked, to-wit: to set aside the remitter of damages, and not to set aside the judgment and dismiss the case, and the court erred in going beyond the motion in its judgment.

WILLIAMS & BLISS, *contra:*

1. The court having jurisdiction of the subject matter, or of such proceedings by provision of statute, the appearance of the parties in court gave jurisdiction of them also, and the parties having then consented, it cures all defects. See Clay's Digest 288, §§ 2, 38, 13, 4; 14 Ala. Rep. 293; 9 Ala. Rep. 399.

2. The party consented that just such judgment should be entered as was entered.

GOLDTHWAITE, J.—Conceding that, by the common law, courts did not possess the power of amending judgments, at any term after their rendition, there can be no doubt that under the act of 1824, Clay's Dig. 322, § 55, the Circuit Court has the authority to amend a judgment, at any time within three years after its rendition, by the correction of any clerical error or mistake of the clerk, where there is sufficient matter apparent on the record to amend by. This, we understand, to be conceded, but it is insisted that the record discloses that the action of the court below, in setting aside the judgment, was not predicated on any mistake or clerical error, and that there was nothing apparent on the face of the record to amend by; that the act of the court was therefore in reference to a subject matter, of which it had no jurisdiction. We think the fallacy of this argument consists, in confounding the subject matter of jurisdiction with the evidence which may be required to support it; the statute confers upon courts the power to amend judgments after the term at which they are rendered, and this is jurisdiction; the same statute restricts the exercise of this power to cases in which the evidence shows a clerical error, or mistake of the clerk, and sufficient matter upon the record to amend by.

The question as to jurisdiction being settled, there is but little difficulty in the case. In King's, Admr. v. Armstrong, 14 Ala. 293, it was held, that although a summary proceeding against a sheriff for a default, in failing to make the money on an execution, did not survive against an administrator, yet it was competent for him to appear, and make himself a party by consent, and that in such case, the court having jurisdiction of the subject matter and the person, the parties could

waive any objection of form or substance, either to the manner in which the defendant was brought into court, or in which the cause of action or defence was developed. So in the case under consideration, the jurisdiction of the subject matter, if not conferred by the common law, was given by the statute before referred to; by the appearance of the parties the court obtained jurisdiction of the person, and thus having complete jurisdiction, the consent of the plaintiff in error to the vacation of the judgment, must be considered as a waiver of the proof required by the statute, or as a judicial admission of the facts necessary to authorize the court to set aside the judgment.

After the judgment was set aside, it is clear that the plaintiff below could dismiss his case.

The judgment must be affirmed.

NORRIS, STODDER & Co. *vs.* COTTRELL ET AL.

1. In assumpsit on a promissory note, a judgment by default having been rendered, the clerk of the court made a mistake in computing the interest due on the note, and judgment was entered for less than the amount really due. The defendant took the case to the Supreme Court, by writ of error, at the term next ensuing, but neglected to file the transcript, and the judgment was affirmed on certificate. *Held*,

   That the plaintiff in the original judgment is entitled to go into equity to have the mistake corrected. (Dargan, C. J. and Chilton, J. *dissenting.*)

ERROR to the Chancery Court of Lowndes.

Tried before the Hon. J. W. Lesesne.

This bill was filed by the plaintiffs in error against the defendants in error, and sets out the following state of facts. A judgment by default, in assumpsit on a promissory note, was rendered at the Spring Term, 1845, of the Lowndes Circuit Court, in favor of the complainants against the defendants in error. The clerk of the court, at the time of entering up the judgment, made a mistake in the computation of interest, and entered up judgment for less than the amount really due.

The defendants sued out a writ of error upon this judgment, and superseded the execution by giving bond; but having neglected to file the transcript, the judgment of the court below was affirmed on certificate, at the next ensuing term of the Supreme Court, and before the mistake was discovered. At the Fall Term, 1847, of the Circuit Court of Lowndes, the mistake having been discovered, a motion was made in that court to correct the mistake and amend the judgment, which was granted, and the judgment was amended accordingly. This judgment was subsequently reversed by the Supreme Court, upon the ground that the judgment of the Circuit Court was merged in the subsequent judgment of affirmance in the Supreme Court, and that the Circuit Court no longer had the power to amend it. After this, a petition was filed in the Supreme Court to have the mistake there corrected, which was denied, on the ground that there was nothing in this court to amend by. The bill further alleges, that complainants had often requested defendants to correct the mistake, and that they refused to do so.

The answer of Cottrell admits all the material allegations of the bill, but alleges that he was only a surety on the note on which judgment was rendered, and that his principal and co-surety were both insolvent. He insists that the mistake was the result of the complainants' own negligence, that their remedy was complete at law, and that, having lost their remedy at law by their own neglect, they could not be relieved in equity.

The chancellor dismissed the bill for want of equity, and his decree is now assigned for error.

Lapsley & Hunter, for plaintiffs in error:

1· A record is nothing more than a written memorial of the contract of the parties, or the action of the court upon it, made by a public officer authorized by law to perform that function, and, like any other memorial or written evidence, may be amended in matters of mistake by a Court of Chancery. Bouv. Law Dic. Title Record; Story's Equity, §§ 160, 166; Jeremy's Eq. Juris. Book 3, Chap. 4, § 5; Comyn's Digest, Title "Chancery, 3 W;" Burnesley v. Powell, 1 Vesey, Sr. 289.

2. This is an ancient and original ground of equity jurisdiction, which is not taken away by the statutory jurisdiction conferred upon the courts of law. Tindall v. Childress & May, 2 Stew. & P. 250; Crawford v. Childress, 1 Ala. 482.

3. But in this case there was no remedy at law, either by a judgment *nunc pro tunc*, or by an independent action. Stephens v. Norris, Stodder & Co. 15 Ala. 79; Oliver v. Holt, 11 Ala. 574.

4. As to the question of diligence; in the first place, that question does not arise. The bill is to correct the Supreme Court entry, which was made wrong in consequence of the erroneous certificate of the clerk below, which followed the erroneous judgment entry; and in the second place, the complainants have not been guilty of any negligence. The statute makes it the sworn duty of the clerk to compute the interest in such cases, and suitors cannot be held responsible for his mistakes.

I. B. STONE, *contra:*

1. The party had his remedy at law, and lost it by his own negligence and inattention. The general rule is, that if a party becomes remediless at law by his own negligence and inattention, equity will leave him to bear the consequences. 1 Story's Eq. § 146; 4 John. Ch. R. 566; 5 Porter, 547, and cases there cited.

2. It was the duty of the plaintiffs in error to have looked over the judgment entry, and to have seen that the judgment was rendered up for the proper amount. Having failed to do so, they cannot be relieved in a court of equity. McGrew v. The Tombeckbee Bank, 5 Porter, 547; 13 Ala. Rep. 540; Drew v. Hayne, 8 Ala. Rep. 438.

3. Equity will not interfere unless all the parties concerned can be placed in *statu quo*. The record shows that the principal is now insolvent, the co-surety is dead, his estate insolvent and finally settled. If the court should undertake to correct the mistake at this late period, manifest injustice would be done to innocent persons.

PHELAN, J.—The mistake which occurred in the calcution of the interest was clearly a mistake of the clerk. The statute devolves upon him expressly the duty of calculating

the interest, when a judgment by default is rendered on a note, bill, or other writing ascertaining the plaintiff's demand. Clay's Dig. 325, § 70.

The right to correct such a mistake as this, by motion to amend in the same court in which it occurs, at any time within three years from its occurrence, is conferred by statute upon the party affected by it. Clay's Dig. 322, § 55.

The original judgment in this case was removed by defendant, by writ of error, to the Supreme Court, at the term next succeeding that of the court below at which it was rendered. The plaintiff in error in that case neglected to file the transcript, and the judgment below was affirmed on certificate. In this way the judgment below was merged in the judgment of this court, and no effectual motion to amend under the statute could be made anywhere; not in the court below, for it no longer had jurisdiction of the case, Wiswall v. Munroe, 4 Ala. 19; and not in this court, for there was nothing in the record to amend by. Stephens et al. v. Norris, Stodder & Co. 15 Ala.

To hold that the mistake of the clerk, in which this state of affairs originated, or the act of the defendant in error in suing out his writ of error on that judgment, should, either separately or taken together, have the effect to deprive the plaintiff of the remedy given him by statute, to amend by motion within three years, and leave him without any other remedy, on the ground that this had been lost by his *laches*, is not consistent with sound reason or justice. He was not responsible for the act of the one, and could in no wise control that of the other, and upon well settled principles, he cannot be prejudiced by either or both.

The cases of McGrew v. The Tombeckbee Bank, 5 Porter, 547, 13 Ala. 540, and Drew v. Hayne, 8 Ala. 438, to which we have been cited by the counsel for defendant in error, are, as we conceive, entirely distinguishable from the case at bar, in the fact that here we find no neglect properly imputable to the plaintiffs in error, for the mistake in the calculation of the interest in the Circuit Court. The statute allowed him three years to find out and *correct* this by motion. But if the law allows him to repose on the calculation of the clerk at all, it will not hold him to the duty of detecting the mistake by the

inspection of the certificate, which is issued to him when the case is taken to the Supreme Court by the defendant; for that contains only the amount of the judgment below, without showing what is principal and what is interest, and in this the clerk would necessarily embody his own mistake, without any of the means for its detection which existed in the record that the plaintiff in error declines to bring up. See the case of Mechanics' Bank of New York v. Minthorne, 19 Johnson, 244.

Under such circumstances, the case was a clear one for the exercise of the old and acknowledged jurisdiction of a court of equity to correct mistakes, and the court below erred in dismissing the bill.

The decree of the court below dismissing the bill is reversed, and the cause remanded.

CHILTON, J.—This bill, in my opinion, was properly dismissed. The ground of equity asserted by it is, that the clerk in computing the amount of the note made a mistake, computing it at too small a sum, and that the judge entered up judgment for the sum thus ascertained. If chancery has jurisdiction to correct this alleged mistake, it seems to me there would be no stopping point for such a jurisdiction. If the mistake of the clerk is a ground of equity, the mistake of the jury or of the judge, by parity of reasoning, is equally so. The party is as much bound to be present and superintend, either by himself or his counsel, the calculation of the clerk and entry of the judgment for the proper amount, as he is to attend to the verdict of the jury and the judgment thereon rendered. In either case, if an error is committed, he has his remedy: in the first, by moving to correct the judgment; in the second, by asking for a new trial. If, however, he waits until either remedy at law is taken away, he has no right to come into chancery. It was his duty to have been in court, and protect his interest; and failing to do this, it is impossible, it seems to me, to say that he has been guilty of no laches.

It is said, it was the duty of the clerk to make a correct calculation, and if he fail to do so, the party who had a right to repose on his act should not be prejudiced. The same may be said of the act of the jury or of the judge, and upon the

same principle, if either commit an error, or mistake, the party may come into equity for relief. But the constant rule of decision has been, to deny relief in the nature of a new trial at law. The party should have sought the new trial in the law court, and having allowed the court to pass without doing so, he is remediless.

The Chief Justice concurs with me in this opinion.

MARTIN *vs.* BLACK'S EX'RS.

1. A promise in writing to pay the debt of another, in consideration of forbearance to sue, is founded on sufficient consideration, and is valid in law.
2. But if the creditor has not the legal right to sue at any time during which he promises to forbear suit, the promise to pay in consideration of such forbearance is without consideration, and consequently void.
3. Letters of administration on the estate of a deceased debtor having been granted *on the 1st October*, 1847, the defendant, who was his mother, promised the creditor, that if he would not proceed to subject the property of the estate to the payment of his debt "until the crop of cotton made in the year 1847 on the plantation of the deceased was sold, *which probably would be during the ensuing Spring*," she would pay the debt. The creditor forbore to institute suit against the estate, and afterwards brought assumpsit against the defendant, on her written promise, *Held*,
That the promise was founded on sufficient consideration.
4. A promise to pay the debt of another, which is not reduced to writing, and is not beneficial to the promisor, is within the statute of frauds, and void.
5. A promise to pay out of the assets of the estate of the deceased debtor will not bind the administrator personally.

ERROR to the Circuit Court of Lowndes.

Tried before the Hon. E. Pickens.

THIS was an action of ASSUMPSIT, brought by the plaintiff, to recover the amount of a note given to the plaintiff by William W. Black, for sixty-seven dollars and thirty-three cents, which the plaintiff alleged that the defendant, Margaret Black, promised to pay. Upon the trial, a bill of exceptions was taken, which shows that William W. Black, the maker of the note, died, and one Harris was appointed his administrator, on the 1st of October, 1847, and on the 18th of the

same month, the defendant, who was the mother of William W. Black, promised the plaintiff, that if he would not take any steps to subject the property of the estate to the payment of his debt, until the crop of cotton raised on the estate could be sold, which would be in the Spring of 1848, she would pay it. This promise was shown to have been in writing. It was further proved, that the plaintiff's claim, and some others, were in the hands of Mr. Colclough for collection, and Margaret Black was desirous to employ him as an attorney, to have the letters of administration granted to Harris revoked, and to have herself appointed administratrix, but he refused to be employed, unless she would agree to pay the claims in his hands for collection against the estate, one of which was the claim sued on; and in consideration of obtaining his services, she did promise to pay said claims out of the proceeds of the crop of cotton raised on the estate. The proof also showed that Colclough acted as her attorney, had the letters issued to Harris revoked, and administration granted to the defendant, for which she paid him one hundred dollars as a fee. But this last promise, to pay the debt out of the proceeds of the crop of cotton, in consideration of the services of Mr. Colclough, was not in writing. Upon this testimony, the court instructed the jury, in effect, that there was no consideration for the first promise, which had been reduced to writing, and that the second promise, which was not reduced to writing, was within the statute of frauds, and consequently the plaintiff could not recover. The plaintiff excepted to these charges, and brought the case to this court to reverse them.

WATTS, JUDGE, & JACKSON, for plaintiff in error.

1. Forbearance is a sufficient consideration for a promise to pay debt of third person. See Story on Contracts, § 435; § 438, 439, 440, 441; Story on Con. § 431, authorities there cited; Lee's Adm. v. Fontaine and Freeman, 10 Ala. Rep. 755.

The case of Brown v. Barnes, in 6 Ala. Rep. 694, saying that the promise, to be binding, must be *beneficial*, is not supported by the elementary authorities. An *injury* to the *promisee* is equally good as a consideration. See Story on

Contracts, cited above, and also Chitty on Contracts. But the case at bar, as disclosed by the record, shows a benefit to the *promisor*. The facts upon which the second charge was predicated clearly show a *benefit* to the promisor, and thus bring it within the principles of the decision in 6 Ala. Rep. even if it does not too much restrict the true principle.

2. The promise upon which the first charge is based, was in *writing*, and was upon sufficient consideration. See authorities above cited.

I. B. STONE, *contra*.

1. The first promise is without any consideration. It purports to have been made upon the consideration of forbearance to sue, when it appears from the evidence, that there was no person that could be sued, until the expiration of the very time for which forbearance was sought. The promise was made on the 18th day of October, 1847, only seventeen days after the first grant of administration, and therefore, by the statute (Clay's Dig. 192), no suit could have been commenced until the 1st of April, A. D. 1844.

2. Forbearance to sue is not a good consideration, unless there is some person that can be sued. See Chitty on Contracts, seventh American Ed. 36, and note; 4 East, 455; 1 Smith, 188.

3. The first promise appears to have been abandoned, and in December, after Mrs. Black had been appointed administratrix, another agreement was made, upon the express consideration, that if Colclough would aid and assist Mrs. Black in the management of the administration, she would then pay the debts in his hands for collection against her son's estate. Upon this express understanding and agreement, the evidence shows, that after the services had been rendered by Colclough, *he charged Mrs. Black one hundred dollars for the services thus rendered*, thus directly violating the agreement himself; and this being the case, Mrs. Black was no longer bound by it.

4. If Mrs. Black paid for the legal services of Colclough, out of her own funds (and the evidence shows this), where is the consideration to support the promise to pay the claims of the creditors of the estate?

5. If there was any consideration at all to support the promise, it should have been in writing; it certainly could not be contended that *it was beneficial to the promisor.*

6. The rule is understood to be, that if the consideration upon which the promise is made, is *beneficial* to the promisor, then the promise is not within the statute of frauds; but if the consideration is *not beneficial* to the promisor, then the promise must be in writing, otherwise it is void. See Brown v. Barnes, 6 Ala. Rep. 694.

7. The promise to pay the debt of the plaintiff in error, was a promise to pay out of the assets of the estate, and therefore was not binding personally upon the administratrix. See particularly, 2 Lomax on Executors, 279, and authorities there referred to.

DARGAN, C. J.—This was assumpsit brought by the plaintiff against the defendants, to recover of them the amount of a note executed by William W. Black to the plaintiff, which the defendants' testatrix promised to pay. The facts on which the plaintiff relies to charge the defendants are these: William W. Black died in Lowndes county, and letters of administration were granted to one Harris on the first of October, 1847. About the 18th of October of the same year, the defendant's testatrix promised in writing that, if the plaintiff would not proceed to subject the property of the estate to the payment of his debt until the crop of cotton made in the year 1847 on the plantation of the deceased was sold, which probably would be during the ensuing Spring, she would pay the debt. The plaintiff forebore to sue the estate, and in November, 1848, brought this action. The court charged the jury that the promise was without consideration, and therefore void.

The rule of law is well settled, that if one promise to pay the debt of another in consideration of forbearance to sue, that such promise, if reduced to writing, is valid in law, being founded on sufficient consideration. Bacon's Abr. vol. 1, title assumpsit, page 425; Story on Contracts, §§, 431, 435, 438. On the other hand, it is equally well settled, that forbearance to sue implies the right to sue, and consequently, if the party to whom the promise to pay is made, had not the

legal right to sue at any time during which he promised to forbear suit, then the promise to pay is without consideration, and consequently void. Bacon's Abr. Supra; 4 East, 455.

Applying these two well settled principles to the promise under consideration, we think the court erred. It is true, that under our law a creditor of an estate has not the right to sue the administrator, until after six months from the grant of administration; consequently the plaintiff in this case could not have sued until April, 1848; but after the first of April, he had the right to sue, and according to the bill of exceptions, he promised to forbear suit during the Spring of 1848; he therefore promised not to sue during the months of April and May after his right to sue was complete. This was a sufficient consideration.

2. We think there was no error in the second charge that was given. The second promise relied on by the plaintiff was not reduced to writing, and we cannot see that it was beneficial to the defendant; therefore it is within the statute, and void. Brown v. Barnes, 6 Ala. 694. Another reason that would render the second charge harmless, if not technically correct, is, that the second or verbal promise was to pay out the assets of the estate, as we construe it; and such a promise will not bind the administrator personally, when it is not founded on some new consideration.

For the error in the first charge, the judgment is reversed and the cause remanded.

McDONNELL *vs.* BRANCH BANK AT MONTGOMERY.

1. As a general rule, the agency of a party must be proved by other evidence than his mere acts, before it can be properly assumed that such acts are binding on the principal.
2. But if the agent is discharging as deputy the duties of a public office conferred upon another, and his acts are of such a continuous character as reasonably to justify the inference that the principal, if a faithful public officer, must have known of them, and would not have permitted the deputy thus to act without authority for so doing, in such case the acts themselves become very strong evidence of the agent's authority to perform them.

3. The fact of agency is an inference to be drawn by the jury; and however strongly the proof may tend to establish such inference, still it is an inference of fact, which the court, as matter of law, cannot assume.
4. The debtor has the right to direct the application of a payment made to his creditor; and if he fails to give such direction, then the creditor may apply it; but if only one demand is proved to exist, and a payment is made without any direction, the law applies it to the payment of that demand.
5. When a clerk has collected money on a judgment, the statute of limitations does not begin to run in his favor until he is guilty of some default with respect to it; if he is shown to have converted it, a demand is unnecessary, and the statute begins to run from the time of the conversion; but if no conversion is shown, the statute begins to run from the time of a refusal to pay on demand.
6. The demand in such case must be made within a reasonable time after the collection; and what is a reasonable time must depend upon the peculiar circumstances of each particular case.

ERROR to the Circuit Court of Barbour.

Tried before the Hon. George D. Shortridge.

This was an action of assumpsit by the Bank against McDonnell, the plaintiff in error. Pleas: Non assumpsit, statute of limitations and payment. Verdict and judgment for the Bank.

The questions presented for revision arise out of a bill of exceptions, from which it appears, that in March, 1839, the Bank recovered a judgment in the Circuit Court of Barbour, of which court said McDonnell was at that time the clerk, against some one who is not named in the record, for the sum of $134 48. It did not appear that any execution had ever issued on said judgment; but one McNab, who was proven by one witness to have acted as the general deputy clerk at the date of the rendition of the judgment, and from thence occasionally until 1844, had written across the judgment, "received in full of this judgment $138 48." There was no evidence that McNab had been sworn in as deputy, or that he had any appointment from the defendant in writing, and his memorandum above copied was all the evidence that the money recovered by said judgment had been collected.

The plaintiff below proved a demand of the money from the defendant on the 27th October, 1845.

It is further stated in the bill of exceptions, "that one witness testified that at the Spring or Fall Term of said court, 1839, defendant paid to the agent of the attorney of record

(who was, as an attorney, attending to the business of the attorney of record and representing him) some moneys collected for said attorney of record, and on cross-examination, the witness stated that he did not know whether the money so paid had been collected for said attorney of record as such, or for him individually. The witness did not know the amount so paid said agent, but said it seemed satisfactory to him. It was admitted that the sum so paid the agent had been paid to the attorney of record."

Upon this evidence the defendant below moved the court to charge the jury, "that plaintiff could not recover of defendant, without further evidence of the deputy's authority to bind him." The court refused this charge, and instructed the jury, "that the defendant was liable under the evidence, if they believed it, for such collection by said deputy."

Defendant prayed the further instruction, "that if the jury believed, from the evidence, a payment was made by the defendant to the plaintiff after the collection of said judgment, they were bound to apply the payment to the demand sued for, unless the plaintiff raised a presumption of a proper application of it otherwise." This charge was also refused, and in lieu thereof the jury were instructed "that if they believed the payment was of some other demand, or on some different account, they should find for the plaintiff."

Upon the statute of limitations, the defendant prayed these instructions be given to the jury: 1. That the statute run from the time of the collection of the money: 2. That the statute of limitations began to run after the lapse of such space of time from the collection, as was reasonably sufficient for the demand to be made. These were likewise refused, and the jury were told, that the statute began to run only from the demand, but that the jury might presume a demand to have been made within a reasonable time after the money was collected. It is also stated in the bill of exceptions, that there was no evidence going to show that the payment above alluded to was applied to any other claim, account or demand.

The several charges of the court, and the refusal to give the instructions asked, are here assigned as error.

BUFORD, for plaintiff in error.

1. The evidence of the deputy's authority was insufficient. He was not a sworn deputy. Clay's Dig. 146 § 19. Defendant's knowledge of the agency must be proved. 1 Livermore on Agency, 36, 37; Fisher v. Campbell, 9 P. 215. The agency must be first proved by other evidence than the agent's acts. Scarborough v. Reynolds, 12 Ala. 259.

2. The evidence of collection during the agency was insufficient. The agent should have been produced. Greenl. Ev. 1st ed. 212 § 180, and note 6, 113; S. & S. 114.

3. The statute of limitations runs from the times laches is imputable to plaintiff. Maury's adm'r v. Mason's adm'r, 8 P. 217. It runs in favor of the sheriff's sureties from time of collection. Gov. v. Stonum, 11 Ala. 679–683. It runs in favor of an attorney from time of collection. Necessity of demand is for his benefit, and to save him from costs. Stafford v. Richardson, 15 Wend. 302.

COCHRAN, *contra.*

When an action will not lie without a previous demand, the statute begins to run from the time of making the demand. 9 Pick. 488.

When a note is payable at a specified time after sight, the statute does not begin to run until that time has expired after the presentment of the note.

When a note is payable so many months after demand, the statute runs from demand, and not from date. Wheaton's Sel. 139; Stark. on Ev. 478; 13 Wend. 267; 2 Taunton's Rep. 323.

An agent who collects money, in the course of some lawful employment, is not liable to an action until a demand has been made, or something equivalent done. Sally's adm'r v. Appleton, 1 Ala. 121; 2 U. S. Dig. 80. Actions shall be commenced within six years after cause of action accrues. Clay's Dig. 326 § 78.

The statute applies to causes of action, and then only after the right to sue has accrued. Lucas v. Thorington, 7 Ala. 605. It cannot be pleaded while any thing is to be done on request, and no request is made. 2 Keene, 121. Prescription does not run against him who cannot sue. Idem.

The statute is no bar to an action on a note payable after

sight, unless a presentation for payment six years before the action brought be proven. 2 Har. Dig. 1459.

Where a promissory note was made payable two years after demand, held that the statute did not begin to run until the two years after the demand had elapsed. 2 Har. Dig. 1458.

In an action against a factor or agent for not accounting, the statute does not begin to run until a demand has been made. 2 U. S. Dig. 807.

CHILTON, J.—The charge prayed for by the counsel for the defendant below, respecting the sufficiency of the proof to establish the fact of McNab's authority, was properly refused by the court, as it would have amounted to an obvious invasion of the province of the jury. It was for the jury, and not the presiding judge, to decide upon the weight of the testimony, and to determine whether the proof, that McNab acted as the general deputy of McDonnell, when he made the memorandum of the collection of this money, and that he occasionally acted in that capacity until 1844, considered in connection with the nature of such acts, as involving public duties, the custody of the public records of the county, and as continuing for such a length of time, was not sufficient to justify the inference that he was employed by McDonnell, or if not specially employed, that his acts were approved and ratified by him.

It is true, as a general rule, that the agency of a party must be proved by other evidence than his mere acts, before it can be properly assumed that such acts are binding on his principal. Scarborough v. Reynolds, 12 Ala. Rep. 259. But if the agent is discharging the duties of a public trust, of an office conferred upon another, as his deputy, and his acts are of such a continuous character as reasonably to justify the inference that the principal, if a faithful public officer, must have known of them, and would not have permitted him thus to act in the absence of authority for so doing; in such case the acts themselves from their nature, coupled with the relative situation of the parties with regard to them, become very strong evidence of the authority of the agent to perform them.

2. Yet the fact of authority is an inference to be drawn by the jury, and while the court below very properly refused to instruct them that the evidence was insufficient to establish it, on the other hand it erred in charging that, if they believed the proof, the agency was established. However strongly the proof may have tended to establish such inference, still it is an inference of fact from the other proof, which the jury very properly might draw, but which the court, as matter of law, could not assume.

3. We are also of opinion, that the court below committed an error, in refusing to give the charge asked, respecting the application of the payment made to the representative of the attorney of record. We say nothing as to the sufficiency of this proof, to warrant the inference of a payment of this demand; for, if it tended to establish this hypothesis, it was sufficient as a predicate for a charge to the jury.

The general rule respecting the application of payments is, that where they are made by a debtor to a creditor, the debtor has the right to direct their application. If he fails to give such direction, then the creditor may apply the payment; but if only one demand is proved to exist, and a payment is made without any direction, the law applies it to the payment of this demand. The court then might well have instructed the jury, that if the clerk made a payment to the attorney who recovered the judgment, after such judgment had been collected by him, they should regard it as a payment on the demand so collected, in the absence of any presumption of an application of it otherwise. Whether, inasmuch as no particular amount is proved to have been paid, the jury would be justified in allowing more than a nominal credit, is a question which we do not now decide.

4. As to the statute of limitation, it is clear that it did not commence running until the cause of action accrued; and no cause of action would exist against the clerk who had collected the money, until he was guilty of some default with respect to it. If it had been shown he had converted the fund, this would have subjected him to an action, and dispensed with a demand. The statute in such case would begin to run from the time of such conversion. Or, if no conversion had been shown, but a refusal to pay on demand, then the

statute dates its commencement from the demand, as until then, the clerk would be in no default, and no action could have been maintained against him. Barton v. Pecks, 1 S. & P. Rep. 486; Sally's Adm'r v. Capps, 1 Ala. Rep. 121; McBroom v. The Governor, 6 Por. 32. The case last cited held, that such special demand must be averred in the declaration, and, as to that point, was overruled by the decision in the case of Hill v. Fitzpatrick, 6 Ala. Rep. 314; but it must still be regarded as an authority to show that a demand must be proved, notwithstanding it may be sufficient to assign the general breach that "although often requested, &c., the defendant refused to pay." This distinction did not occur to me when I wrote the opinion in the case of Nelms v. Williams, 18 Ala. Rep. 650, and what is said in that case, seemingly in conflict with the view here expressed, must be regarded as *dicta* merely.

Where a note is payable on demand, the statute commences running, it is said, from the date of the note. The reason is, that an action may be maintained upon it immediately without demand. Blanchard on Lim. 45; Norton v. Ellam, 2 M. & W. (Ex.) Rep. 467; Presbrey v. Williams, 15 Mass. Rep. 193; Ruff v. Bull, 7 Har. & John. 14; Angel on Limitations, 97. But if the note be payable so many days after demand, the statute begins to run from the demand, because until that time the action does not accrue. Angel on Lim. 98, and cases cited in notes to 2d Ed.; ib. 178–9. The demand must, however be made in a reasonable time after the collection. What shall be considered a reasonable time, has not been, and perhaps cannot be settled by any definite rule as applicable to all cases; but must depend upon the peculiar circumstances of each particular case. Wallace v. Agry, 4 Mason Cir. C. Rep. 336; Ang. Lim. 98; see Coleman v. Rodgers, 10 Pick. Rep. 120.

What we have said will constitute a sufficient guide for the future conduct of the cause.

For the errors previously noticed, the judgment is reversed, and the cause remanded.

GOLDTHWAITE, J., not sitting.

BLANN *vs.* CROCHERON.

1. When two persons jointly commit a trespass, the injured party may sue them severally; yet he can have but one satisfaction, and when separate judgments are recovered he must elect on which recovery he will seek it.
2. A plea setting forth a former recovery against a co-trespasser, and a voluntary payment of the damages and cost to the clerk in open court, by the defendant in that judgment, without averring that the plaintiff accepted such payment in satisfaction of his recovery, is bad on demurrer.
3. When the injured party has severally sued two or more joint trespassers, and recovered separate judgments against them, his right to elect *de melioribus damnis* is not determined, until he sues out execution, or accepts satisfaction of one of the judgments.

ERROR to the Circuit Court of Dallas.

Tried before the Hon. Robert Dougherty.

GEORGE W. GAYLE, for plaintiff in error.

BYRD, *contra.*

LIGON, J.—The plaintiff sued the defendant in trespass, and it appears from the record that he had also brought suit, and recovered judgment against one Quartermas for the same trespass, in a separate action; but it no where is shown that execution was sued out by the plaintiff to enforce the collection of his judgment against Quartermas. It further appears that the amount of that recovery, both as to damages and cost, had been paid to the clerk of the Circuit Court in which it was had, before the trial of this cause in the court below; and the defendant pleaded *puis darrein continuance,* "that since the bringing of the action in this case, the plaintiff has received full satisfaction of the trespass complained of in this suit, by a judgment against Isaiah Quartermas, the constable, a joint trespasser, which judgment has been satisfied in full by payment of the amount of the judgment, and the costs in said case, to the clerk of the court in open court."

To this plea a demurrer was interposed by the plaintiff, which was overruled by the court.

When this case was here at the last term of this court, it was held, that the plaintiff might sue the joint trespassers severally, and have several recoveries, but could receive but

one satisfaction for the injury done; "that a recovery against one, without a satisfaction of that recovery, would form no bar to his proceeding to judgment against the other. And having judgment against both, the plaintiff might then elect *de melioribus damnis*, and issue his execution against one, which would amount to a determination of his right to elect, and preclude him from proceeding against the other, except for cost."

Since that time it appears, that the co-trespasser, against whom the plaintiff had recovered his judgment, has voluntarily paid the damages and costs to the clerk, and this is pleaded as an estoppel in this action.

The only question presented for our consideration is, does the payment to the clerk, without instructions from the plaintiff to him to receive the money paid as a satisfaction of the judgment against Quartermas, determine the election of the plaintiff, and estop him from further proceedings against the defendant? Or, in other words, can the clerk and the defendant in the judgment make the election for the plaintiff, without his authority, and, as far as we are advised by the record, against his will? We think the clerk has no such power, and as the plaintiff was entirely passive, refusing to issue execution against Quartermas, his right can be in no wise affected by the acts of that individual and the clerk, unless it is averred and shown, that such acts were done with his sanction and by his authority. Were the law otherwise, it would enable joint trespassers, who were sued separately, to hasten the trial of the one least guilty among them, and by satisfying, in the clerk's office, the damages and costs adjudged against him, to free themselves from all responsibility for their own greater guilt. In fact, it would change the rule of law, which gives the right of election in such cases to the plaintiff, and bestow it upon the defendant.

To determine the plaintiff's right to elect, *he must act.* Were he to order execution to issue on the judgment in his favor; or, in case of payment to the clerk, as in this case, were he to accept the money, his election would be considered as having been made; and it might be specially pleaded by a co-trespasser, against whom a suit was then pending, as an estoppel. But to make the plea good, it should aver that

the sum so paid in satisfaction *was accepted by the plaintiff as such.* The plea in this case lacks that averment, and is consequently bad on demurrer.

For the error of the court below, in overruling the plaintiff's demurrer to the defendant's plea *puis darrein continuance*, the judgment must be reversed, and the cause remanded.

GREENE *vs.* FARLEY.

The notary who protests a bill of exchange, is authorized to give notice of its non-payment; and such notice may be given by mail, although the actual holder, and the party to be charged, reside in the same place.

ERROR to the Circuit Court of Montgomery.
Tried before the Hon. Geo. Goldthwaite.

WILLIAMS & COCKE, for plaintiff in error.

Where the holder of a bill and endorser both reside in the same place, the notice to charge the endorser must *be personal*, or notice must be left at his residence or place of doing business. Stephenson v. Primrose, 8 Porter, 152; Foster v. McDonald, 3 Ala. 34; Pierce *et al.* v. Pinder, 5 Metcalf, 352; Phipps v. Chase, 6 ib. 491; 4 Hill, N. Y. 129; 5 ib. 237; 3 Harrington, 419; 1 Conn. 329; 15 Maine, 141; 8 Watts & Serg. 138; 6 Blackford, 312; 7 ib. 133; and a custom of the notaries of a particular city to give notice through the post-office, cannot make that practice lawful. Wilcox & Fearne v. McNutt, 2 How'd M. R. 776.

The case of Gindrat *et al.* v. Mech. Bk. of Augusta, 7 Ala. 331, does not contradict this principle, but is an authority for plaintiff.

The court there say, notice through the post-office was sufficient, without regarding any special custom of the Bank of Montgomery, and the reason assigned is, because that the *agent* holding a bill for collection is not bound to give personal notice to the parties; but such agent should immediately notify his principal, and then the principal is entitled to send

the notice by the mail, &c. The court there held, that as the Bank of Montgomery was the agent of the Bank of Augusta, the plaintiff, and had done that which it was the privilege or right of its principal to do, namely, to give notice through the post-office, such notice was sufficient.

So we insist here, if Farley, the plaintiff and owner of the bill, had the privilege of giving notice through the mail, the notice here would be good: but this is the principle we deny; we deny that Farley had that privilege, and if he had not, his agent had not.

The only possible difficulty is, that the bill in this case is drawn on Thomas McGraw, Mobile, but the bill is not payable at Mobile or any place else; nor does it appear where McGraw resided at the date of the protest. What difference can it make where the bill is payable? This cannot be of consequence. The bill in the case of Gindrat, above referred to, was made payable at the Bank of Montgomery, where the endorsers resided. There the right to notice through the mail was made not to turn on where the bill was payable, but where one of the parties, to wit, plaintiffs, resided.

JEFFERSON NOBLE, for defendant.

1. It is conceded to be the general rule of the law merchant, that when the holder of a bill resides in the same place with the party to be charged, and that is also the place of dishonor, personal notice is necessary, because it is the earliest, most direct and certain method of communicating knowledge of the fact. But the rule is not applicable to the present case, because the drawer resided in Mobile, where the bill was made payable and where it was dishonored. In all the cases cited by the plaintiff in error, the bill was dishonored in the same place where the parties to be charged resided. 8 Porter, 155; 3 Ala. 34; 7 ib. 331.

2. In the present case, the notice was legally sufficient, and was given in the usual manner. The notary was authorized to give the notice by mail, as he did, or to transmit the bill to the actual holder and let him give the notice. Either mode was correct. 3 Ala. 34; 7 ib. 332.

GOLDTHWAITE, J.—The bill of exchange sued on was

directed to the drawee at Mobile, Ala., and there protested for non-payment. Notice was given by the notary public, who protested the bill, by mail, to the plaintiff in error, who was the endorser, and who, with the holder, resided in Montgomery. The only question is as to the sufficiency of this notice. In the cases of Stephenson v. Primrose, 8 Port. 155, and Foster v. McDonald, 3 Ala. 34, the party giving, and the party sought to be charged by the notice, both resided in the same place, and in the absence of any special custom, notice through the post-office under these circumstances was held insufficient. In the case of Gindrat v. The Mechanics' Bank of Augusta, 7 Ala. 332, Mr. Justice Goldthwaite, in delivering the opinion of the court, says: "We apprehend it is entirely competent for the holder of a bill payable in Montgomery, and himself residing elsewhere, to direct an agent to whom it is transmitted for collection, to give notice of the dishonor to any of the parties by mail, and that it is immaterial where they reside, so the notice has the proper direction." And it was held by this court, in Crawford v. The Branch Bank of Mobile, 7 Ala. 205, that the notary public who protests a foreign bill of exchange, is authorized to give notice to all persons who are responsible to the holders. If a foreign notary is regarded as the holder of the bill, so far as giving notice of its non-payment, no reason can be perceived why a notary in this State might not perform the same act. Without adding other authorities to sustain these positions, it is clear, that under the influence of the decisions referred to, the charge requested was properly refused. The judgment is affirmed.

SMITH *vs.* WOODING.

1. In assumpsit for the use and occupation of land for two years, it is not error for the court to refuse to dismiss the suit, either of its own motion, or at the instance of the defendant, upon the plaintiff's statement that he had never claimed but for one year's occupation, and that the suit was brought at the instance, and for the benefit, of another person, who had indemnified him against the costs.

2. Nor is it error to refuse to permit such voluntary statement to be proven to the jury.
3. When the vendee enters into the possession of land under a parol contract of purchase, by the terms of which he was to pay "$500 down, and $500 twelve months afterwards," and he entirely fails to pay the purchase money, and, after remaining in possession for more than twelve months, abandons the land, the vendor, if he is in no fault, may recover in assumpsit, for use and occupation, the value of the land during the time the vendee so held it.

ERROR to the Circuit Court of Tallapoosa.

Tried before the Hon. E. Pickens.

This was an action of assumpsit by Wooding against Smith, for the use and occupation of land. The plaintiff proved, "that he sold the defendant a tract of land by a verbal contract, and put him in possession; that defendant was to pay him $500 down, and $500 twelve months after, and was to enter into a written contract with plaintiff respecting the land, to be drawn up by one Pickard, and that defendant failed to pay plaintiff according to the contract. It also appeared in evidence that defendant informed one Shropshire that he would not let Pickard draw up the writings, but said he was willing for one Winslett to draw them; but there was no evidence that plaintiff knew this; that defendant, in reply to a message from Pickard to come over and settle about the land, stated that he would not have anything to do with the land, which was communicated to plaintiff. The evidence tended to show that Pickard was, by an understanding between him and defendant, to take a part of the land, and that he and defendant had had some controversy about it. The defendant proved that he, together with Pickard, had made fifty dollars worth of improvements upon the land; also, that whilst he was in possession, and had been for about thirteen months, and after his failure to pay, and his refusal to let Pickard draw the writings, plaintiff sold the land to one Johnson, and brought an action against defendant for unlawful detainer, and recovered; that defendant took the case to the Circuit Court, where the judgment was reversed and the case remanded, when plaintiff dismissed his complaint. Between the sale to Johnson and the dismissal, defendant left the premises. This was the substance of the testimony in the case."

Before the case was put to the jury, the plaintiff Wooding,

"at the instance of the defendant to have the suit dismissed," as the bill of exceptions reads, "stated to the court that he sold the land to Johnson, and never had claimed but one year's rent; that he allowed Pickard to bring the suit, at the instance of said Pickard, he (Pickard) indemnifying him (plaintiff) against costs; that Pickard had given him bond to indemnify him, and the suit was prosecuted by Pickard, and for his benefit the action brought for two years' rent."

This evidence was then offered by defendant to the jury, to which plaintiff objected, and the court sustained the objection.

The court charged the jury, that if they found the defendant had either failed or refused to pay plaintiff according to contract, or refused to enter into writings with plaintiff, although the defendant was still in possession when the land was sold to Johnson, plaintiff was entitled to recover.

The court was requested by defendant to charge: 1. That unless the evidence satisfied them that plaintiff had demanded of defendant to enter into writings, according to contract, he was not entitled to recover.

2. That unless they believed from the evidence that plaintiff had offered to enter into writings according to contract, he could not recover. These charges the court refused.

The charge given, and the refusal to charge as requested, and the refusal to allow the statement made by the plaintiff to the court on the motion to dismiss, to go to the jury, are assigned as errors.

Rice & Morgan, and Woodward, for plaintiff in error:

1. The general power is vested in every court of preventing the abuse of its process, and of the means provided for the administration of *justice.* Beavers v. Smith, 11 Ala. Rep. 28.

2. This power will be exercised even by this court, which has only appellate power, "where the fact is admitted, or where its truth is inferrible from its not being denied," and will be exercised even *after judgment is rendered*, but before the certificate of affirmance issues. Bradford v. Bush, 10 Ala. Rep. 274.

Under the influence of these authorities, the court below

was bound to dismiss the suit, as soon as the plaintiff below made his statement in relation to the institution of the suit, &c. and his being indemnified against the costs.

No court of justice can lend its aid or allow its process to be used, in a transaction which thus violates the policy of the law, and tends to convert the courts into mere instruments of vexation and oppression, for the benefit of men who (like Pickard) have suffered no wrong. And as the fact is admitted by the plaintiff on the record, this court should now make an example, and do what the court below should have done, reverse the judgment and dismiss the cause, at the cost of the *plaintiff below*, (Wooding,) and leave him to seek indemnity out of Pickard.

3. But if there was no error in failing to dismiss the suit, "*before the case was put to the jury*," on the admissions of Wooding above set forth, it is clear that these admissions of Wooding (the plaintiff on record) should have been allowed to go to the jury as evidence. The admissions of the plaintiff are surely evidence *against himself*. The admissions here were important, in this: The *action was brought* for *two years' rent;* the *admission* of Wooding was, that he "never had claimed but *one year's rent*." The defendant below was clearly entitled to the benefit of this *admission*, bearing directly, as it did, on the *amount* of damages or rent, if the plaintiff below recovered at all. The exclusion of this *admission of plaintiff* was a fatal error.

4. The charge of the court, that if the defendant had *either failed or refused* to pay plaintiff according to contract, *or* refused to enter into writings with plaintiff, is palpably erroneous upon the evidence, all of which is set forth. It is self-evident that the *mere failure* of defendant *to pay*, could not give a plaintiff a right to recover. The charge necessarily misled the jury.

The charges asked were properly asked, and should have been given as asked. The additional charge given by the court was erroneous.

FALKNER, *contra.*

PHELAN, J.—The counsel for the plaintiff in error, in

the brief which he has submitted, argues very strenuously, that it was the duty of the court to have dismissed the suit of the plaintiff below, upon the statement made by him, that it was prosecuted for the benefit of another, and that he had been indemnified against the payment of costs, upon the ground, that it is the duty of the court "to prevent its process from being abused, and turned into instruments of vexation and oppression." In the first place, the record does not show, that any exception was taken by the defendant to the refusal of the court to grant his motion to dismiss; it is, indeed, more an inference, than a direct statement that any motion to dismiss was made. If the position intended to be assumed is, that the court should dismiss a suit in the case supposed, on its own mere motion, it is not tenable, for two reasons; First, the facts do not make out a case of "abuse of the process of the court.

A man who has a good cause of action may sell it to another, or make a gratuity of it, if he chooses, and the only restriction imposed by law upon the transaction is, that if the cause of action be not assignable, the suit shall be prosecuted in the name of him to whom it originally belonged, *for the use of the transferree;* and if the latter chooses to indemnify the former against costs, or if the former even stipulates for such indemnity, there is nothing unlawful about the matter. But if the facts even made out the case supposed, and these amounted to a defence to the action, they must be submitted to the jury, since our courts have decided uniformly, from an early day (Smith v. Seaton, Minor, 75), that the court, except in cases provided by statute, have no power to order a non suit (Hunt v. Stewart, 7 Ala. Rep. 525), against the will of the plaintiff.

The offer of the defendant to prove to the jury the statement made by the plaintiff to the court, was properly overruled. It does not plainly appear how this statement came to be made, whether it was voluntary or not; but we must presume it to be voluntary, as the court has no power to compel a party to make a statement in this way. There is much of this statement that is wholly irrelevant to the issue before the court, even as an admission of the plaintiff, and the offer to prove it as *a whole*, which was the offer made by de-

fendant, could be rightfully overruled by the court. He might also have admitted it, without error, as *a part* of it was relevant; but in such a case the court is not bound to discriminate; that is the business of the parties themselves. Hrabowski's Ex'r v. Herbert Daniel & Co. 4 Ala. Rep. 265.

The charge of the court lays down the broad proposition, that if defendant had either *failed* or *refused* to pay according to contract, or had *refused* to enter into writings, that plaintiff was entitled to recover.

The defendant took possession of the land under a verbal contract to purchase, and a part of this contract was, that he should pay "$500 down, and $500 twelve months after." The proof shows, that he paid no money; that he remained in possession for more than twelve months, and then abandoned the possession, before the suit was brought. There is no proof that he failed or refused to pay the money because the plaintiff neglected or refused, upon application, to execute to him a deed or other written contract for the purchase and sale of the land, as a condition to his payment of the money. His failure to pay the money, then, was a violation of his contract, from the very day he took possession, as to the first $500, and a further violation, after twelve months, as to the second $500; which made him liable to the plaintiff at any time for the use and occupation of the land for the time he occupied it. The contract being for the sale of land, and not in writing, bound neither of the parties, under the Statute of Frauds, and it was in the power of either to disregard it altogther. But if the defendant was put in the possession of land under it, and then refused to comply with the contract on his part, without fault on the part of the plaintiff, the latter would be entitled to an action for use and occupation, to recover of the defendant whatever the possession of the land was reasonably worth.

A contrary doctrine was held for a time, under the imposing authority of Lord Mansfield, in the case of Kirtland v. Pounsett, 2 Taunton, 145, upon the construction of the English statute giving the action for use and occupation of land, (11 Geo. 2), of which ours is a copy, (Clay's Dig. 505, § 1,) in which he held, that to authorize that action, the relation of landlord and tenant must exist, and that when a party enters

under a contract of purchase, the idea of landlord and tenant is negatived.

The criticism of Mr. Baron Graham, in the Court of Exchequer, in Hull v. Vaughan, 6 Price, 157, upon that case, indicates the course of decision now generally adopted, in respect to the action for use and occupation. He says; "It is not necessary, in this species of action, that the proper relation of landlord and tenant should be distinctly made out between the parties, because the action is calculated in form to meet cases where the parties do not bear these characters, if there be in point of fact an ownership on one hand and an occupation on the other; and it should be liberally applied where it may be found to be a party's only remedy." See, on this subject, Davidson v. Earnest, 7 Ala. Rep. 817, and authorities there cited.

If the view taken of the charge given by the court be correct, there was no error in refusing to charge that plaintiff was bound either to *offer* to enter into writings, or to *demand* of defendant that he should do so. The plaintiff's right of action was complete as soon as defendant took possession of the land, and *failed* to pay the money he stipulated to pay, and as he stipulated to pay it.

There is no error in the record, and the judgment is affirmed.

Ex Parte LOWE.

1. When a new trial is granted to the defendant "on the payment of all the costs of suit," the order is not an *absolute*, but a *conditional* grant of a new trial, and its effect is to keep the cause in court *sub judice* until the next term.
2. And if the costs are paid during vacation, or before the cause is called up for action by the court at the next succeeding term, the condition is complied with, and the effect of such a payment is to place the cause on the docket for trial.
3. When a cause is improperly stricken from the docket, *mandamus* is the remedy to procure it to be reinstated.

Motion for a *mandamus* against the Circuit Judge of the eighth judicial circuit.

MARTIN & BALDWIN, for the motion.

1. The order granting a new trial on payment of cost was an absolute grant of a new trial. Wheatly v. Price, 3. J. J. Marsh. 169; Dana v. Gill, 5 J. J. Marshall, 243; Johnson v. Taylor & Reed, 3 Smedes & Mar. 99; Reese v. Billing, 9 Ala. Rep. 263; Stephenson v. Mansony, 4 Ala. Rep. 317; Whitaker v. Sanford, 13 Ala. Rep. 522; Lyon v. Long, 6 Ala. Rep. 103. Cost could not be paid before it was taxed, and in many instances it could not be taxed during the term of the court. Southerland v. Sheffield, 2 Wend. 293.

2. A *mandamus* is the proper means of obtaining relief. Stephenson v. Mansony, 4 Ala. Rep. 318.

N. HARRIS and H. C. SEMPLE, *contra.*

1. The judgment was once in force, and unless expressly opened or annulled *during the term*, must continue in force until reversed by a superior tribunal.

2. The order that a new trial be granted was clearly conditional, and the condition a *condition precedent.* See Sands v. McLellan, 6 Cow. 582; Somers v. Sloan, 3 Harrison, (New J. R.) 46, *overruling* Gilliland v. Rapplea, 3 Green. 139; Rixey v. Ward, 3 Randolph, 52; Moberly v. Davar, 5 Blackford, (Ind. R.) 409; Jackson v. Eddy, 2 Cowen, 598, 600; Dodsley v. Lady Hamilton, 5 Taunt. 1, where it said that wherever a *favor* is granted on terms, performance is a condition precedent.

3. It may be said that the condition was impossible, as it extended beyond the term. If so, the right could now vest. See authorities cited in Parsons's opinion in Edwards v. Lewis, 18 Ala. 494; Bacon's Ab. Vol. 1, title condition, M. page 650; Taylor v. Bullen, 6 Cowen, 624 7; Wood v. Worsley, 2 H. Blackstone, 574; and note (a) same case, page 582; and 6 Durnford & East. 710.

4. Some cases are cited, one from Miss. recognizing one in 5 J. J. Marshall, where it is stated that such an order is not conditional, but that the party has a right to his costs, which may be enforced by attachment or execution. This is denied in the English cases, and in a case in Cowen, where it said that the order is a favor to the party applying for it, and his acceptance of it with the condition *depends on his own vo-*

lition. See Hand v. Lady Dinely, 2 Strange, 1220; Stokes v. Woodson, 7 Sum. R. 6; Note to Jackson v. Eddy, 2 Cowen, 600; Fricker v. Eastman, 11 East., 319.

5. If the order required the payment of costs, within the term, then the judgment was in force at the conclusion of the term, and the defendant Lowe would not be bound for any costs, afterwards accrued, because, the case was *at an end.* And the party would have a right to prepare for trial, if he chose to do so, as the defendant would not be prejudiced by his doing so.

6. The understanding among the lawyers of Montgomery, as to the practice on such orders, would be evidence for the defence in case of a suit by the client against his attorney, for *negligence*, but is no evidence of the *law.*

DARGAN, C. J.—Benjamin P. Hunter brought an action on the case against Lowe, in the Circuit Court of Montgomery, and at the Fall term, 1850, obtained a verdict and judgment for $180 54-100. During the same term Lowe, the defendant, moved the court for a new trial, and the motion coming on to be heard, the following order was made: "Came the parties by their attorneys, and the defendant moves the court for a new trial, on the ground that the verdict was contrary to law and without evidence; which motion being heard and understood by the court, it is considered that a new trial be granted the defendant, on the payment of all the costs of suit." The defendant did not pay the costs until the first day of the next succeeding term, when they were paid, and afterwards at the same term, the plaintiff moved the court to strike the case from the docket, because the costs had not been paid during the previous term, at which the order was made. On the trial of this motion, it appeared that the plaintiff had examined a witness by deposition, in the vacation between the two terms, and that he had been cross-examined by the defendant. The defendant also examined several members of the bar, who testified that the usual interpretation put upon such orders was, that the cost should be paid by the next succeeding term. The court, however, granted the motion, and made the judgment absolute, to which the defendant excepted, and now moves the court for a *mandamus* to compel

the Circuit Court to reinstate the cause on the docket, and proceed with the new trial.

Whether we should grant the writ depends on the proper construction of the order made at the Fall term, 1851. We cannot yield our assent to the proposition that this order was an absolute grant of a new trial. It is beyond doubt certain, that the presiding Judge did not intend to grant a new trial unconditionally; if he had, no condition would have been attached to the grant. It is therefore a grant of a new trial upon condition, and this condition was that the defendant pay all the costs of the suit. Had he then paid all costs that had accrued, the condition would have been performed. But he did not pay the costs until the next succeeding term. Was this a compliance with the condition? The well-settled rule is, that when the act constituting the condition is the payment of money, but the time when it is to be paid is not specified, then the money is to be paid within convenient time. Bacon Abr. Vol. 2, title, condition, 324; Carter v. Carter, 14 Pick. 424; Roberts v. Beattie, 2 Penn. 63. What is a convenient or reasonable time, must be ascertained by the circumstances of each particular case, unless in a particular class of cases the law has settled what shall be so considered; and we think that what is to be considered reasonable time in the case before us has been settled by the previous decisions of this court. In the case of Willis & Co. v. The Planters' and Merchants' Bank of Mobile, decided at the last term, (19 Ala. 141) the question arose upon an order setting aside a judgment, and granting a new trial, "upon condition that the defendant pay all the cost" that had accrued in the cause. The costs had not been paid, and at the next term, an order was made discharging the order of the previous term, and authorizing the plaintiff to proceed to enforce his judgment. We held, in conformity with the practice as indicated by our previous decisions, that such an order did not absolutely vacate the judgment, but its effect was to continue the cause in court until at the next term it was ascertained whether the condition was performed. To the same effect are the cases of Mansony v. Stephenson, 4 Ala. 317; Reese v. Billings, 9 Ala. 265. These decisions establish the practice, that such an order as the one before us may be complied with at, or by, the next succeed-

ing term, or even when the cause is called up for action by the court, and its effect is to keep the cause in court *sub judice*, until that time. That such is the best practice that could have been adopted, no one will pretend; but it has existed for a considerable time, and has received the sanction of this court. We cannot, therefore, depart from it. It may not, however, be improper to remark, that the Circuit Courts should never grant new trials upon conditions to be performed in vacation, or at the next succeeding term; for the effect of such orders is to keep the judgment suspended until the next term, and if the defendant then declines to perform the condition, he may do so, but in the mean time he has gained a term, and the plaintiff, when he gets rid of the motion, may often discover that he has lost the opportunity of collecting his debt. The new trial ought to be granted absolutely, or not at all. We, however, must adhere to the practice which we have sanctioned, and consequently hold that the payment of the costs, on the first day of the next succeeding term after the order was made, was a payment within a reasonable time, and that the effect of such a payment when made, was to place the cause on the docket for trial. The court, therefore, erred in striking it off, and the writ of *mandamus* is the proper remedy to have it reinstated. See Mansony v. Stephenson, *supra*. It is not, however, usual to grant the writ in the first instance, but a rule to show cause why it should not be granted.

Let the rule be entered.

COOK *vs.* WALTHALL.

1. Garnishment only lies to subject those demands for which the defendant in attachment could maintain debt or *indebitatus assumpsit*.
2. Two attachments, issued by a justice of the peace, were levied by a constable on certain personal property of the defendant, and plaintiff's attachment was levied soon afterwards by the sheriff on the same property; several other attachments were subsequently issued by the justice, and were also levied by the constable on the same property, and judgments having afterwards been rendered by the justice in all the attachment suits pending before him, the prop-

erty was sold by the constable, and the proceeds of sale paid over to the justice; plaintiff notified the justice that he claimed the surplus remaining in his hands after satisfying the two attachments first levied, but the justice disregarding the notice paid over the surplus to the junior creditors, and the plaintiff afterwards summoned him by process of garnishment as the debtor of the defendant. *It was held*—

That these facts showed no debt or demand which could be reached by process of garnishment.

ERROR to the Circuit Court of Wilcox.

Tried before the Hon. N. Cook.

Cook, the plaintiff in error, having obtained a judgment upon proceedings in attachment against one William H. Faulke, issued a garnishment, requiring Walthall, the defendant in error, to appear and answer what he was indebted to Faulke, or what moneys and assets of his he had in his hands, &c. Walthall answered, that he owed Faulke nothing, and had no effects of his in his hands at the date of the service of the garnishment. This answer was contested as incorrect, and an issue was formed to try its truth under the statute.

Upon the trial of this issue, it appeared that Walthall, as a justice of the peace, had issued two writs of attachment on the 27th December, 1847, one in favor of B. S. & T. T. Reeves for $13 25, the other in favor of George O. Miller for $25 65, against the estate of said Faulke. These writs were placed in the hands of one Tanner, a constable, who levied them on divers chattels, among which was a sorrel horse, as the property of said Faulke. It was shown that the attachment of Cook was levied by the sheriff, a few minutes after the constable had levied, upon said horse, and that such levy by the sheriff was so endorsed on the attachment and returned by him into court. After this, divers other small attachments were issued by Walthall, as justice, placed in the hands of Tanner, the constable, and by him levied on the same property. Judgments having been rendered on the attachments returnable before said justice, executions were issued, and the constable sold the property on twelve months credit. The money was subsequently collected by him, and paid over to said justice, Walthall, who received notice from Cook before he paid out the money, that he, Cook, would contend for all the fund remaining after satisfying the two attachments first

levied. Said Walthall, nevertheless, disregarding the notice, refused to retain the surplus, but paid it over to the junior attachments. This disposition of the fund was made previous to the service or issue of the garnishment upon him; but it appeared the parties to whom the same was paid, had indemnified said Walthall against liability on account of such payments.

Upon this state of facts, the court charged the jury, that if they believed that the defendant Walthall was neither indebted to Faulke, nor had any effects of his in his hands at the date of the service of the garnishment, other than the receipt of the money from the constable, arising from the sale of the property levied on as shown by the proof, they should find for the garnishee. This charge was excepted to by the counsel of Cook, who brings the cause to this court by writ of error, and assigns the same as the ground for reversal.

Jenkins, for plaintiff in error, made the following points:

Plaintiff in attachment has a right to contest a garnishment suit, which seeks to obtain the money owing by the purchaser of the attached property, and which had been lawfully sold by an older execution than the attachment. 12 Ala. Rep. 473, Johnson v. Burnett's adm'r. And in that case, the debtor had given his note, payable not to defendant in attachment, but to the officer who sold the attached property under the older execution; and the debtor and officer who sold, Burnett, were both summoned as garnishees; and the opinion of the court, and the whole adjudication in that case, proceeded on treating the funds as in the hands of said officer.

A levy of execution subsequent to levy of attachment, cannot defeat the lien of the attachment. Pond v. Griffin, 1 Ala. Rep. 678. And as to priority of liens, see Smith v. Hogan, 4 Ala. 93.

The lien of an attachment levied by garnisheeing, not defeated by garnishee's paying under judgment and execution, the amount owing the defendant in attachment at the time of service of the summons. 15 Ala. Rep. 732, and ib. 183.

Garnishment will lie wherever *indebitatus assumpsit* would lie by defendant in attachment against garnishee. McGehee v. Walke, 11 Ala. Rep. 273, and 17 ib. 312.

No counsel for defendant.

CHILTON, J.—It may be conceded, that the lien created by the levy of Cook's attachment could not be defeated by the subsequent levy of other and junior attachments by the constable, and that Cook is not without remedy to enforce his lien; yet it is too clear to admit of doubt, that he cannot reach the fund by the process of garnishment. This is a proceeding by which a creditor is enabled to reach in a summary way a demand due from a third person to his debtor; and to entitle the plaintiff to this remedy, it must be shown that the judgment debtor could have maintained debt or *indebitatus assumpsit* for the recovery of the demand sought to be subjected. McGehee v. Walke, 11 Ala. Rep. 273. In other words, the plaintiff in the garnishment is merely substituted to the rights of his debtor; and if the latter could neither maintain debt nor assumpsit for the recovery of the demand sought to be recovered, the plaintiff in the garnishment is not entitled to this remedy. McGehee v. Walke, 15 Ala. Rep. 183. Now it is not contended that Faulke could have recovered this fund from Walthall by any action, for the money certainly belongs either to the plaintiff in error, or, his claim aside, to the creditors of Faulke whose attachments were subsequently levied. It is not a question whether the money shall be paid to Faulke or to the attaching creditor, but the controversy is between two creditors who have conflicting liens by virtue of their levies. This controversy cannot be settled in such proceeding as this.

Again: Walthall had paid over the money to persons entitled as against Faulke, to receive it, *before* the garnishment issued, so that he could not be regarded as Faulke's debtor when the garnishment was served.

In any view which can be taken of this case, it is clear the party has mistaken his remedy, and that the court properly instructed the jury to find for the garnishee, if he had received from the constable the proceeds of this sale, as set forth by the proof in the bill of exceptions, and was not otherwise indebted.

Whether, if the facts stated in the bill of exceptions be true, Cook has not his remedy against Walthall for the sur-

plus remaining after satisfying the two attachments first levied, we are not now called upon to decide. We are very sure these facts do not make Walthall Faulke's debtor, and consequently show no demand which can be reached by garnishment.

Let the judgement be affirmed.

RANDALL, ADM'R. *vs.* SHRADER.

1. Under the statute of distributiou in this State prior to the passage of the acts of 1848 and 1850, an ante-nuptial agreement entered iuto between husband and wife, which stipulated that the wife "shall, during her natural life, have the sole management and control of" the slaves owned by her before marriage, "with the exclusive right to dispose of the same at her death," vests the entire estate in the slaves in the wife for her separate use; and if she die without disposing of them, they go to her administrator and next of kin, and not to her husband.

ERROR to the Circuit Court of Shelby.
Tried before the Hon. Geo. D. Shortridge.

Detinue by the plaintiff against the defendant in error, for certain slaves.

By the bill of exceptions it appears, that Zachariah Neal died, having made his will, which was duly admitted to probate, by which Frances Neal, his widow, was made residuary legatee of his estate, after the payment of his debts and a few specific legacies. Before the final settlement of his estate, but when the slaves in controverry were in possession of his widow, she, in contemplation of marriage with the defendant Shrader, entered into an ante-nuptial agreement with him, which was signed and sealed by both, and which declares "that the said parties having determined to enter together into the estate of matrimony, and being desirous to secure to the said Frances Neal, during her life, the control of certain property, and the right to dispose of the same at her death, it is agreed by and between the said parties, that the said Frances Neal shall, during her natural life, have the sole

management and control of twenty negro slaves now belonging to the estate of her former husband, Zachariah Neal, deceased, with the exclusive right to dispose of the same at her death, and that the said Frances Neal shall have like control of a wagon and carriage, and eight horses now in her possession." The marriage was solemnized, and the slaves remained in the possession of the parties until the death of the wife, who made no disposition of them. In the mean time the executors of Zachariah Neal made final settlement of his estate. Randall, the plaintiff in error, became the administrator of Mrs. Shrader, and brought an action of detinue to recover the slaves named in the agreement, from Shrader, the husband, who retained possession of them after the death of his wife, claiming them as his own. The court below charged the jury, that upon these facts the defendant was entitled to a verdict, which was accordingly rendered. The plaintiff excepted to this ruling of the court, and here assign it for error.

Rice & Morgan, for the plaintiff in error:

1. The settled doctrine of this court is, that the husband is not entitled to the slaves owned by the wife at the time of the marriage, unless he had reduced them into his possession "during the life of the wife." Vanderveer v. Alston, 16 Ala. Rep. 497; Bibb v. McKinley, 9 Porter, 644.

2. Although the possessson need not be *actual* in every case, it must be actual or constructive. Thus, possession by the wife's guardian is, by *operation of law* the possession of the husband. "This *constructive* possession of the husband, by virtue of which his marital rights attach, arises out of *the relation* in which the guardian stands towards him." McDaniel v. Whitman, 16 Ala. Rep. 343.

3. "Unless he reduces them into possession, *no property* vests in him, but they shall remain to the wife or to *her representatives*, after the coverture is determined." Bibb v. McKinley, 9 Porter's Rep. 642; Andrews v. Jones, 10 Ala. Rep. 422.

4. His possession must be "*as husband;*" for if it be a possession held as executor, or trustee, it will not vest the property in him. Nor will he acquire title to the property, if there be an *ante-nuptial* contract securing to the wife "during

her natural life," "the *sole management and control*" of the slaves, "with the exclusive right to dispose of the same at her death," and he resides with the wife and with her has possession of the slaves. "His possession will be referred to the deed, and is in law the possession of the wife." Lee v. Matthews, 10 Ala. Rep. 686; 9 Porter, 644, Supra.; Price v. Sessions, 3 How. U. S. Rep. 624; Clancey's Heirs and Wife, 132, 133.

5. The law never *implies* a contract, when there is an *express* contract. And so there cannot be a *constructive* (or implied) possession, when there is an *express* contract excluding such possession. 3 Johns. Chan. 87; 17 Johns. Rep. 548.

6. If the husband never acquires *possession during the life of his wife*, he cannot acquire title to her slaves. The accrual of his title depends on his acquiring such possession. By his own contract (in this case) before the marriage, he deprived himself of acquiring the possession *during the life of his wife*, and thus necessarily prevented the property from vesting in him. 10 Missouri, 368.

7. The words used in the ante-nuptial contract, create a separate estate in the wife, by indicating that the "intent was to secure the slaves to the use of the wife, in such a mode as to be inconsistent with *the enjoyment* of the property by the husband or with *the exercise of dominion over it by him.*" Newman v. James, 12 Ala. Rep. 29; Clancey's Husband and Wife, 262, 267.

8. An agreement by a husband that "his wife shall enjoy and receive rents and profits," gives her a separate estate. O'Neal et al. v. Teague, 8 Ala. Rep. 349.

9. But whether a separate estate is created or not, it appears that the husband in this case has by an ante-nuptial contract duly executed and recorded, declared his settled intention not to reduce the slaves of his wife to his possession during her life, or to assert his marital rights, and it is not pretended that during the life of his wife he ever did or said any thing in conflict with this declared intention. "Between *husband and wife,* his possession may be qualified by his *intention*, and the ownership follows his *will.*" Andrews & Bro. v. Jones, 10 Ala. Rep. 422, 423.

10. It is important to observe in this case, that at the mar-

riage the slaves belonged to the estate of the former husband of the defendant's wife; that she was the residuary legatee of her former husband, that the executor had not at her marriage with defendant, assented to the legacy, that it is distinctly stated in the ante-nuptial contract, that the slaves belonged to the estate of said former husband, and that the slaves were mere choses in action at that time, that *the legal title* to them was then in the executor of Neal and remained so, long after the marriage and until the final settlement of Neal's estate in 1843. Property of this kind could not possibly vest in the husband before the final settlement. When the ante-nuptial contract is construed with reference to these facts, it must be understood as a plain engagement by the husband that *the title should never vest in him as husband.* 3 Howard's Rep. 634, Supra.; 9 Porter, 644, Supra.; 3 Dessausure's Rep. 156; 2 McCord's Ch. Rep. 433; 6 Gill & Johns. 349; 6 How. U. S. Rep. 78.

11. In Maryland and New York, and all other States which adopt the English decisions founded on 29 Ch. 2, c. 3, § 25, a *suspension* of the marital rights of the husband *during the life of the wife*, does not deprive the *surviving* husband of his right to his wife's property and his right to administer upon her estate after her death. Ward v. Thompson, 6 Gill & Johns. Rep. 349, and cases cited on page 352.

But according to the law and decisions of Alabama, as well as the common law, a suspension of the marital rights "during the life of the wife," is equivalent to "an entire abandonment" of such rights. The rule here is fixed, that unless the marital rights attach during the life of the wife, they can never attach, and they can never attach until the husband, during the life of the wife, acquires possession of the property as husband. Randall v. Shrader, 17 Ala. Rep.; 5 Missouri Rep. 193; 10 Missouri Rep. 368.

In Tennessee the decisions founded on the English Statute of 29 Ch. 2, are held to be law, giving the husband as survivor the choses in action and property of the wife, whether reduced to possession or not; it is held that when the marriage settlement makes no disposition of the property in the event of the wife's death, the right of the husband "as survivor," is clear. But it is not pretended that he has any

right by remainder, or in any other way than as survivor. And this right of survivorship is created by statute. Brown v. Brown, 6 Humph. 127; Stewart v. Stewart, 7 Johns. Ch. Rep. 243; 1 Rice's Eq. Rep. 315.

The cases cited from the Mississippi Reports, and others, by the defendant's counsel, are not binding in Alabama; because they are based upon the New York and English cases, which are founded on the English Statute of 29 Ch. 2, c. 3, § 25; and because all such decisions are directly opposed to the Alabama decisions and to the common law.

White & Parsons, for defendant in error:

1. By the marriage, the husband becomes a purchaser, for a valuable consideration, of all the wife's personal property and choses in action, and the title to such as are reduced to possession during the coverture, vests in him absolutely. Andrews & Bro. v. Jones et al. 10 Ala. 400; Brown v Brown, 6 Humph. 127; 3 Hen. & M. 399; 1 Roper on Property, 169; Stewart v. Stewart, 7 John. Chy. 245.

2. That this marriage contract did not become operative until the marriage took place. 2 Story's Eq. § 1379. It could not become operative before that event, because until that event took place, it is not pretended that Shrader had any interest in the property.

3. The law favors the marital rights of the husband, and will not consider them interfered with by any disposition of property for the wife's benefit, unless there is a *clear exclusion* of his interest and control. 8 Por. 73; 15 Ala. 173; 15 ib. 122; Atherly on Marriage Settlements, 25; and this intention must appear "*beyond a reasonable doubt*, or otherwise he will retain his ordinary legal and marital rights over it." 2 Story's Eq. § 1381; 3 Vesey, 166, and Lamb v. Milnes, 5 ib. 520.

4. When the wife's *separate estate is for life only*, "she holds the remainder, not to her separate use, but by virtue of the power, and as she would take any other property, *subject to the claims of her husband upon it.*" Clancy's Husband and Wife, 296. The Lord Chancellor said, "It was *well settled* in the cases alluded to by Mr. Romilly, *and many others*, that where there is an express limitation for life, with a power to

dispose *by will*, the interest is equivalent only to an estate for life," 10 Vesey, 378. The cases referred to by Mr. Romilly are in 3 Leonard, 71, and 4 ib. 41; 13 Vesey, 452; Roper on Husband and Wife, 201, and the cases cited in the notes. And this distinction between a power to dispose by *will*, and by *deed or will*, was expressly recognized in the case of Bareford v. Street, 16 Vesey, 135. And Irwin v. Faner, 19 Vesey, 85, was decided upon the authority of Bareford v. Street, Supra, and Tomlinson v. Dighton, 1 Pr. W. 149, and rests upon the ground that the neice of Mary Smart could appoint "by will or *otherwise*," and therefore does not conflict with the authorities we rely on.

We must, therefore, come to the conclusion that she took a separate estate for life, and he the remainder. 1 John. Chy. 532, and cases cited; Stewart v. Stewart, 7 John. Chy. 245, 246, 249; 6 Humph. 127; 7 S. & M. 488; 6 Gill & John. 349; 6 How. U. S. 70; 17 Conn. 201; 10 Yerger, 222.

By the terms of this contract, the parties declare their intention, they are "*desirous* to secure to the said Frances Neal *during her life*, the control," &c. The terms of the agreement do not enlarge the estate; they secure the property to her *during her natural* life, to her *sole* management and control, and with the exclusive right to dispose of it at her death.

As to what constitutes a chose in action, see Vanderver v. Alston, 16 Ala; Hopper v. McWhorter, 18 ib. 229; Magee v. Toland, 8 Por. 40; 3 Litt. 282–3; Pitts v. Curtis, 4 Ala. 350; 2 Dev. & Batt. 135.

6. By the marriage the property was conveyed to the husband, and the title was in him, subject to the contract entered into previous to the marriage. For it is too clear to admit of argument, that a conveyance by Henry Shrader, who had no title, to Frances Neal, who had an absolute title, would be a nullity without the subsequent marriage. It is, then, as though Frances Neal had conveyed to Henry Shrader all the title to the property which she had previous to the marriage, which is not embraced by the marriage contract, and it is reduced to this.

What was the estate which was conveyed by the marriage contract? It was "the control of the property during her life, and the right to dispose of the same at her death." The

words "management and control" cannot imply more than a separate estate, or a title to the property. She then took, by the conveyance of her husband, who had the absolute title, a separate estate in the property *for her life*, and at the termination of her life her estate was *to end by the express letter of the contract.* She had but one right which extended beyond her life, and that was the right to dispose of it at her death. This she did not do. She had the right, but has failed to exercise it. She is dead, and the right, or her right, of disposition is gone, *extinguished.*

LIGON, J.—The only question necessary to be considered in this case is, what estate was secured to Mrs. Shrader by the ante-nuptial agreement between her husband and herself?

In express terms, it gives her a separate estate in the slaves and other property for life, with a general power to dispose of them at her death. In our view, the whole and entire estate passed to her by this agreement, and she was left to enjoy, use, and dispose of the property as though no marriage had ever been consummated, and that, dying without having made any disposition of the slaves, our statute of distributions, as the law stood at the time of her death, gives them to the next of kin of the wife, and not the husband. For this interpretation of the contract see Bareford v. Street, 16 Vesey, 139; Imlay v. Huntington, 20 Conn. 169; Ewing v. Smith, 3 Eq. Rep. (S. C.) 417; Jacques v. Methodist Epis. Church, 17 John. 548.

The whole estate was in Mrs. Shrader before the ante-nuptial agreement was made, and, indeed, up to the time of her marriage with the defendant. He had no right or claim whatever to any portion of the property, and expected none, except such as the law would cast on him by virtue of his marriage. To hinder his marital rights from attaching. he solemnly enters into a deed, by which he covenants that he will not claim or assert them during the life of his wife, and that at her death she shall have the general power to dispose of the slaves. He thus gives the entire estate into her hands, and throws himself on her bounty. She has not thought proper to bestow anything on him, and, under the law, he can take nothing; nor will he be allowed to set up a claim in opposition to his covenant.

It is proper to remark, that since the cause of action arose in this case, our statute of distribution, in certain cases, has been made much more favorable to the husband, by the acts of 1848 and 1850; but these acts can have no influence on this case.

Let the judgment be reversed and the cause remanded.

ELLIOTT, ADMR., &c. *vs.* THE BRANCH BANK AT MOBILE.

1. When the administrator in chief fraudulently, or without authority, makes a sale of personal property belonging to his intestate's estate, the parties in interest may treat it as an administration; and if they elect to do so, the administrator *de bonis non* cannot recover the property.

ERROR to the Chancery Court of Mobile.

Tried before the Hon. J. W. Lesesne.

The bill alleges that the administrator in chief of Elliott had, without an order of sale from the Orphans' Court, sold, and conveyed on the books of the Bank, certain stock belonging to the estate of his intestate, to one Munroe, for its full value; that the proceeds of the stock had been appropriated by the administrator to the benefit of the estate, and that the Orphans' Court had recognized the sale, by passing his accounts, in which this item was charged, and discharging him; that the plaintiff in error, as administrator *de bonis non* of said intestate, had commenced an action against the defendant in error, for the dividends of the stock which, since the said sale and transfer on the books of the Bank by the administrator in chief, had been paid to Munroe. A motion was made to dismiss the bill for want of equity, which was overruled. The chancellor decreed in accordance with the prayer of the bill, and perpetually enjoined the action at law.

DOUGLASS SMITH, for plaintiff in error.

PHILLIPS, *contra.*

GOLDTHWAITE, J.—We are satisfied that the complainant had a perfect remedy at law against the action which it was the object of the bill to enjoin, and the decree of the chancellor was therefore erroneous. The effect of a sale by an administrator, of the personal property of the estate, has been frequently considered by this court, and without intending to affirm in this opinion the principles on which those decisions rest, we do not understand that any one of them has gone to the length of deciding, that where the estate has in fact received the consideration of the sale, and the parties really in interest have elected to treat it as an administration, rather than a wrongful conversion of the property, that the representative of the estate, the administrator *de bonis non*, can recover it. Indeed, the case of Kavanaugh and Wife v. Thompson, 16 Ala. Rep. 818, holding that the distributees, at a settlement with the administrator in chief, might elect to charge him with the property of the estate he had converted, or receive the amount he had recovered, is conclusive on this point, and does not in the slightest degree conflict with Swink, Adm'r. v. Snodgrass, 17 Ala. Rep. 615, in which no consideration was paid by the purchaser for the property, which was fraudulently aliened by the administrator. The result of the decisions is, simply, that a fraudulent sale, or one made by the administrator without authority, is not an administration, unless the parties in interest choose so to consider it; and if they fail to do so, their representative, the administrator *de bonis non*, can recover the property. The bill, however, charges, that the stock brought its value, that the purchase money was applied to the extinguishment *pro tanto* of an execution against the estate, that the administrator had charged himself with the amount received, accounted with the Orphans' Court for the same, and been discharged on a final settlement with such court. Any of the parties interested in the distribution of the estate could, on such settlement, have treated the property sold as unadministered. They choose, however, not to do so, and having made their election, are bound by it. These facts, if proved, would constitute a full defence to the action at law, and this being the case, chancery cannot take jurisdiction.

The decree of the chancellor is therefore reversed, and the

bill dismissed, the defendant in error paying the costs of this court and the court below.

RAINER *vs.* McELROY.

1. A non-resident, who voluntarily appears in the Court of Probate and contests the validity of a will, may be required to give security for the costs if unsuccessful.
2. The Judge of Probate is not entitled to any fee for "certificates of filing bond for costs," nor for "filing depositions, and certificates of filing the same."
3. A sheriff is not entitled to any fee for "entering and returning notices," nor for "entering subpœnas."

ERROR to the Court of Probate of Sumter.

This was a motion by McElroy, as executor of Isaac McElroy, deceased, against the plaintiff in error, for a judgment for costs.

Upon a petition by the executor pending in the Probate Court of Sumter, to admit to probate the will of Isaac McElroy, deceased, it appears from the record, that James Bunyard and Delia, his wife, who were persons residing in the State of Mississippi, appeared and voluntarily made themselves parties contestant, without being specially cited or summoned. The citation and notice was to the heirs and legatees residing in this State, and they at the time resided in Mississippi. They however appeared, and in right of Delia Bunyard, the wife, who was the daughter of the deceased and one of the legatees named in the will, voluntarily made themselves parties contestant against the validity of the will. Upon the ground that the said James Bunyard, at the time of the controversy, was a non-resident of this State, he was required by the court to give security for costs, to which he objected, but his objection was overruled, and he gave a bond for the costs with the plaintiff in error as his security. Upon the trial respecting the validity of the will, the issue was found against the contestants, and the will was established and admitted to probate.

It appeared that the costs had not been paid, and upon proof of these facts, the Probate Court granted the motion, and gave judgment against the plaintiff in error for the costs of that proceeding.

Upon the taxation of costs, sundry items were objected to by the plaintiff in error, as not being legal. The following items and charges were excepted to, among the costs taxed in behalf of the Judge of Probate:

1. To issuing three *venires* and empannelling jury...	50
2. To approving bond for costs.....	50
3. To certificates of filing same.....	50
4. To two certificates to affidavits for continuance, 50 cents each.....	$ 1 00
5. To three certificates to affidavits to take the depositions of witnesses, 50 cents each.....	1 50
6. To filing two depositions and certificates of filing, 50 cents each	1 00
7. To thirty witness certificates, 50 cents each.....	15 00

The following items and charges were excepted to, among the costs taxed in behalf of the sheriffs of Sumter and Dallas:

1. To serving thirty-six subpœnas, 50 cents each....	$18 00
2. To entering and returning same, 25 cents each....	9 00
3. To serving two notices, 50 cents each.....	1 00
4. To entering and returning same, 25 cents each....	50
5. To copies of the same, 25 cents each.....	50
6. To serving three subpœnas, (Dallas sheriff,) 50 cents each.....	1 50
7. To entering and returning same, 25 cents each....	75

The giving of judgment on the motion aforesaid, and the taxation of each item of costs aforesaid separately, are assigned for error.

HUNTINGTON, for plaintiff in error.

R. H. SMITH, *contra.*

PHELAN, J.—We have heard no sufficient reason assigned why Bunyard and wife, who are proved to have been non-residents, should not have been required to give security for costs as non-resident plaintiffs. They were actors in the proceeding in the Probate Court to try the validity of the

will of Isaac McElroy, deceased. The statute says: "Every action at common law and suit in chancery, commenced in the name of any person residing out of this State, shall be dismissed, if security be not given," &c., "for the payment of the costs which may be awarded to the defendant," &c. This was doubtless intended to comprehend every judicial controversy to which there were opposing parties, that could lawfully come before the regularly constituted tribunals of the country. The case of Jacott et al. v. Hobson, 11 Ala. 435, is analagous to this. There the suit was the statutory proceeding for a "trial of the right of property." The reasoning of the court in that case will hold good in this; for which see that case.

Let us next take up the costs taxed, to which exceptions were taken, and consider them. All the statutes upon the subject of fees declare, that none shall be taxed except such as are expressly allowed by law. Clay's Dig. 231; Acts of 1850, p. 30. Viewed in the light of these statutes, we consider as good and lawful all those which were allowed to the Judge of Probate by the court below, and to which exceptions were taken as aforesaid, except the two following, viz: "To certificates of filing bond for costs, 50 cents; to filing two depositions, and certificates of filing same, 50 cents each, $1;" and for these we find no sufficient authority.

And we further consider as good and lawful all those which were allowed to the sheriffs, to which exceptions were taken, except those taxed as follows, viz: "To entering and returning two notices, 25 cents each, 50 cents; to copies of two notices, 25 cents each, 50 cents;" and for these we find no sufficient authority. One item or more of the bill of costs to the sheriffs is in these words: "To entering and returning subpœnas, 25 cents each." A fee is properly chargeable for "returning" a subpœna, under the provision for "returning *mesne process*," but there is no provision that we can find which allows to a sheriff a fee for "entering" a subpœna in terms, or as *mesne process* generally. The fee for "returning" is 12½ cents, and not 25 cents, and to the extent of one-half therefore, these items are not lawful.

For the error in taxing the costs, in the particulars, and to the extent specified, contrary to the exceptions of the plaintiff

in error, the decision of the court below in the matter of the taxation of the costs is reversed; in all else it is affirmed; and this court proceeding to render such a judgment as the Probate Court should have rendered, directs a judgment to be entered against the plaintiff in error in favor of defendant in error, for the sum adjudged to him by the court below, deducting therefrom the items of costs herein decided not to be lawful.

MONTGOMERY *vs.* MONTGOMERY.

1. When an execution against the unsuccessful party in the Appellate Court is returned "no property found," and execution thereupon issued against the successful party, for the costs occasioned by himself, as provided by the statute (Clay's Digest, 310, § 25), and returned "satisfied," an *alias* execution may be subsequently issued against the unsuccessful party.

MOTION to set aside a judgment rendered on a previous day of the term, quashing an execution for costs, which had issued from the Appellate Court. The facts upon which the motion was based, appear in the opinion.

JOHN A. ELMORE, for the motion.

1. Costs were not given at common law *eo nomine*, but were in fact *always included in the quantum of damages*, in actions where damages were given, or entered on the roll, as increase of damages, by the court. Bacon's Ab. tit. Costs, A, note a, 484; 3 Bl. Com. 399; Gilbert's Hist. C. P. 266.

And after the statutes in England giving costs, the jury taxed them in their verdict, separately from the damages; and when too little, the court, on motion, increased them, by ordering the officer to tax them. Bacon's Ab. Costs, L, 539–540.

And costs were deemed at common law, and after the statutes on that subject, as damages. Bacon's Ab. 540.

The practice in England now is, for the costs to be taxed by the officer of the court. Bacon's Ab. 545.

And no costs are allowed for a witness who has not been

paid before the claim is made. Bacon's Ab. 541; 3 Brod. & Bing. 292.

The plaintiff sues out or purchases, by paying the stated fees, the original writ. 3 Bl. Com. 273–274.

And at every stage of the proceedings, where any process is required by him, he in like manner pays for it, as for the original; and this was the practice at common law, before any statutes were passed in relation to costs.

It would seem, then, that at common law, and since the passage of the statutes, a party was not entitled to costs, *unless he had paid them.*

2. The practice in this state is different: and no costs can be collected until the end of the suit, except in particular cases.

If a plaintiff pays his witnesses, or all the costs he may incur, before the determination of the suit, such costs may be taxed and collected by execution, from the defendant, if the plaintiff obtains his judgment. The costs of the cause are collectable from the unsuccessful party, by execution. Clay's Dig. § 10, 238; Clay's Dig. § 12, 601.

The successful party has the right to an execution to collect the costs. The payment by him of these costs, before the right to the execution has accrued, does not divest him of this right. The payment by him of these costs, after the right to issue the execution has accrued, cannot affect his right to collect these costs, any more than the payment made before; and the payment on the execution makes no difference.

If it had been intended that such a payment by the successful party should be a satisfaction of his judgment, the law makers would have so said.

The demands or judgments are distinct, not one and the same. The one judgment is in the name of Jane Montgomery, who sues by her next friend, against R. B. Montgomery, and others; and until this judgment is paid, there can be no satisfaction. There would be more plausibility in the argument of the opposite counsel, if the statute authorized an execution to be issued at once against either party; but on one state of facts a judgment and execution are given against the unsuccessful party; and on this and a superadded state

of facts, a *quasi* judgment is given, and for a different amount, against the successful party, and an execution is given against him. It is not the same judgment, because the parties are different.

It is strange that the plaintiff, by paying this demand, loses rights which he would have retained, if he had not paid; in other words, that the plaintiff, if insolvent, could run his execution against the defendant, but being solvent, and paying, he forfeits the right; for it is a forfeiture, in effect, if turned round to his suit.

THOMAS J. JUDGE, *contra.*

1. The statute of 1827 (Clay's Dig. 310, § 25), authorized an execution to issue against the plaintiffs, for the costs created by them, on a return of "no property found" against the defendants for the costs; this having been done, and the plaintiffs having paid the same, it operates as a satisfaction, *pro tanto*, of the judgment against the defendants; and to the extent of such satisfaction, no further or other execution can be issued against defendants.

2. In this case, the entire amount of the costs of this court was created by the plaintiffs; after a return of "no property found" against the defendants, an executiou was issued against the plaintiffs, for the entire costs, which was returned *satisfied;* and which operated as a complete and full satisfaction of the judgment against the defendants.

3. But it is asked, "How can the payment of a debt of defendants, for which plaintiffs are bound, operate as a satisfaction in favor of defendants?" We answer; "the debt is not thereby satisfied, *but the remedy, only, for the collection, is changed;* you cannot now run an execution on a *satisfied judgment*, for your benefit: your remedy is, to sue at law for its collection; for from a debt *to the clerk*, it has become *a debt to you*, by your payment of it for us; and it must be collected as other debts are." Morrison, Givhan, *et al.* v. Marvin, 6 Ala. Rep. 797.

DARGAN, C. J.—Jane Montgomery, by her next friend, sued out a writ of error against Robert B. Montgomery, rereturnable to this court, to reverse a decree rendered by the

Court of Chancery of Lowndes. The decree was reversed, and she was adjudged to recover her cost, accruing in this court. Upon this judgment for cost, an execution was issued against Robert B. Montgomery, the defendant in error, which was returned by the sheriff, "no property found." After this return, an execution was issued against the plaintiff in error, under the statute in such cases provided, and the costs were paid by her next friend. After this payment, the plaintiff in error applied for and obtained an *alias* execution against Robbert B. Montgomery; and on a previous day of this term he moved to quash the execution, and to have the judgment for cost satisfied, on account of the payment so made by the plaintiff in error. The motion, not being resisted at the time, was granted, and the plaintiff now moves the court to set aside the judgment quashing the execution, and to discharge the motion previously made.

It is scarcely necessary to inquire, how costs were recoverable, if at all, at common law. They are expressly given by our statute to the successful party, and are taxed by the clerk, who issues the execution for their collection; and when the execution is returned, "no property," then an execution is directed to be issued against the plaintiff in the original execution, for all the cost created by him in obtaining the judgment. Clay's Dig. 316. The plaintiff in the execution, therefore, becomes immediately liable for all the cost created by him, upon a return of his execution against the defendant, "no property;" and execution may go against him to enforce this liability. Being then liable, his payment only extinguishes this liability, but does not in any manner affect his rights against the defendant. They remain the same, and an *alias* execution may be issued to enforce them.

We all concur in setting aside the judgment heretofore rendered, and in discharging the motion to quash the execution issued in favor of the plaintiff in error against the defendant.

GODBOLD *vs.* ROBERTS, ADM'R.

1. Assumpsit does not lie against an administrator *de bonis non* in his representative character, to recover money received by him from the administrator in chief, arising from the sale of property belonging to the estate which was exempt from sale.
2. A declaration, which unites a count against the defendant as administrator *de bonis non* with a count against him individually, is demurrable for misjoinder of counts; and the objection may be taken on general demurrer to the whole declaration.

ERROR to the Circuit Court of Monroe.

Tried before the Hon. John Bragg.

This was an action of assumpsit by the plaintiff in error against the defendant, as administrator *de bonis non* of William Godbold, deceased, to recover the value of certain property which had been sold by the administrators in chief, and which the declaration alleges was by law exempt from sale. The declaration contains a special count, and the common counts for money had and received, &c. The special count sets forth the sale of the property by the administrators in chief, and the receipt of the money, "whereby they became indebted to the said plaintiff in the sum of $600; and being so indebted, as administrators as aforesaid, they were removed from the administration of said estate, the said estate being declared insolvent, and the defendant was duly elected administrator of said estate, as an insolvent estate, by the creditors thereof, and thereby the said defendant, as administrator *de bonis non* of said estate, became indebted to the said plaintiff in the said sum of $600; and being so indebted, the said defendant, as administrator as aforesaid, promised to pay," &c.

The common counts allege an indebtedness from the defendant, "as administrator as aforesaid," for money had and received by him "as administrator as aforesaid," &c.

The defendant demurred to the declaration "because the action is assumpsit to recover of defendant, as administrator *de bonis non*, for the tort of the administrator in chief," and this demurrer was sustained.

S. J. CUMMING, for plaintiff in error:

1. Where goods are wrongfully taken and sold by a party, the tort may be waived, and assumpsit maintained for money had and received. Neat v. Harding, 4 Eng. L. & E. Rep. 494; Upchurch v. Nosworthy, 15 Ala. 705; Crow v. Boyd's Adm'r. 17 Ala. 51; Ib. 734.

2. The administrators in chief were liable, because the moneys sued for arose from the sale of the effects left by the intestate, in the regular course of administration. 7 Ala. 468; Howard's Adm'r. v. Powers, 6 Ohio, 92. If the action would lie against the administrators in chief, it will now lie against the administrator *de bonis non.* Acts of 1846, p. 14.

3. The demurrer to the whole declaration cannot be sustained. Hooks v. Smith, 18 Ala. 338.

R. C. TORREY, *contra:*

The demurrer to the declaration was rightfully sustained:

1. If it is to be considered as applying to the first count only, it will be sustained, because the defendant is sued in his representative capacity, when from the nature of the claim it is clear, that the action could be brought against him only in his individual capacity. Burdine v. Roper, 7 Ala. Rep. 466.

It does not allege that the funds received by the administrator in chief were ever received by Roberts, and there can be no privity between Roberts and the plaintiff. Granting that she could waive the tort, and sue the administrators in chief in assumpsit, (Upchurch v. Nosworthy, 15 Ala. 705,) yet she shows no legal right as against Roberts. Westmoreland v. Davis, 1 Ala. 299. She can claim nothing from Roberts, unless she can trace the particular sum into his hands. Such a sum would not be assets in his hands, hence the action will not lie against him in his representative capacity.

If, waiving the tort, she could sue the administrators in chief in assumpsit, quere: could she bring the same action against Roberts, even if it had been alleged that the administrators in chief had turned over all the effects of the estate to him?

Again: it is evident that the proceeds of the sale of the exempted articles are so mingled up with the assets of the es-

tate, that the aid of a court of equity must be invoked for the purposes of discovery and account.

2. If the demurrer is to be considered as applicable to the whole declaration, it will be sustained as to the second and third counts, for two reasons. First, it is alleged that the defendant is administrator *de bonis non* of an *insolvent* estate, and he is sued in that capacity. It is too well settled to require comment, that the administrator of an insolvent estate cannot be sued as such. Formerly, all suits against an administrator would abate upon a declaration of insolvency. Now, suits pending at the time of the declaration, may continue to a judgment, which will be certified to the Probate Court.

But all such suits must have been upon causes of actions existing at the death of the testator or intestate; for, secondly, it is also well settled that the administrator cannot, by his act or contract, bind the estate. On claims and demands arising from his acts, he must be sued individually. Hence, the second and third counts are defective, because it is not alleged that the claims arose from the act of the intestate.

If the plaintiff has a money demand against the administrator as such, she must seek her redress through the Probate Court, like other creditors or distributees. If the claim had its origin since the death of the intestate, and by the act of the administrator, he can be sued at law only in his individual character.

CHILTON, J.—The defendant in error, even conceding that the money sought to be recovered had been received by him from the administrator in chief, would not be liable, *as administrator*, to respond to the plaintiff.

The case of Burdine v. Roper, 7 Ala. Rep. 466, is directly in point, to show that this action cannot be maintained against the defendant in his representative character. If the administrator in chief, or the defendant as administrator *de bonis non*, had actually executed a note *as such representative*, for the payment to the plaintiff of the money here sought to be recovered, it is well settled that no judgment could be recovered upon it at law, to be levied *de bonis intestatis*, but the administrator would be personally liable; see Williams v. Hinkle, 15 Ala. Rep. 719, and cases there cited; 2 Wms.

Exrs. 1089. If, then, the administrator could not have created by an express promise a legal liability against the estate, it is difficult to conceive upon what principle the law would raise an *implied* promise to bind it, growing out of his tortious act in selling property which the statute reserves from sale.

The first count being against the administrator *de bonis non*, in his representative character, is clearly bad, and if the succeeding counts may be regarded as against him individually, this would make the whole declaration demurrable for misjoinder of counts, and it is settled that such objection is reached by general demurrer to the whole declaration. If, however, the common counts, like the special count, be considered as charging the defendant in his representative, and not in his individual character, then they are obnoxious to the objection taken to the first count.

We deem it unnecessary to notice the other questions raised respecting the right of the plaintiff to sue. The view we have taken is decisive of the case, and shows that the demurrer to the declaration was properly sustained. See Anderson v. Rice, at this term.

Judgment affirmed.

MORRIS *vs.* RUSSELL.

1. When a suit is pending in one county, and a summons of garnishment arising out of it is sued out and sent to another county, and is returned executed by the sheriff of the latter county, and a judgment *nisi* is afterwards taken against the garnishee for failing to appear and answer, to authorize a judgment final against such garnishee the writ of *scire facias*, issuing on the judgment *nisi*, must be sent to the county in which the garnishment was served, or in which the garnishee resides, and be returned by the sheriff of that county.

ERROR to the Circuit Court of Macon.

Tried before the Hon. Geo. W. Stone.

This was a proceeding by garnishment in favor of the defendant in error against the plaintiff in error in the court be-

low. The summons of garnishment was executed upon the plaintiff in error in Mobile county, and the attachment suit out of which it grew was pending in the Circuit Court of Macon county. The garnishee failed to appear and answer, and judgment *nisi* was rendered against him. On this judgment, a first and second writ of *scire facias* was issued to the sheriff of Macon county, and each being returned *nihil*, the court rendered judgment final against the plaintiff in error.

From this judgment a writ of error is prosecuted to this court, and its rendition upon the two writs of *sci. fa.* returned *nihil* by the sheriff of Macon, is assigned for error.

SEARORN WILLIAMS, for plaintiff in error.

G. W. GUNN, *contra.*

LIGON, J.—In the case of Wood v. Russell, at the present term, the precise point arising in this case was presented, and we held, that, where a suit is pending in one county, and a summons of garnishment arising out of it is sued out, and sent to another county, by the sheriff of which it is returned executed, and a judgment *nisi* is taken against the garnishee for failing to appear and answer; the writ of *scire facias*, issuing on such judgment *nisi*, must be sent to and returned by the sheriff of the county in which the process of garnishment was served, or in which the garnishee resides, in order to sustain a judgment final against such garnishee.

Such is not the case here, and the judgment is reversed, and the cause remanded.

NICHOLS *vs.* STEWART.

1. Proof of declarations, verbal or written, made by a witness out of court, is, as a general rule, inadmissible *in corroboration* of testimony given by him on the trial of a cause.

ERROR to the Circuit Court of Perry.

Tried before the Hon. John D. Phelan.

This case was brought into the Circuit Court, by a *certiorari* to the judgment of a justice of the peace. On the trial in the Circuit Court, one Wallis was examined as a witness for the plaintiff, who swore that before the suit was brought before the justice, he was present at a conversation between the parties, in which the plaintiff called on the defendant to pay him an account for beef; that the defendant replied that he did not have the money, but would pay him as soon as he could get it. On cross-examination, this witness was asked, whether, when sworn in the case before the justice of the peace, he had not stated in answer to a question, as to the money, which the plaintiff called on the defendant to pay in such conversation, being for beef, that he did not recollect that it was mentioned what it was for. In reply to this question, the witness stated that he did not so answer and testify before the justice, but had always said it was on account of beef. The evidence of this witness, as to his testimony before the justice, was contradicted by several witnesses examined by the defendant. The plaintiff then, for the purpose of sustaining the witness Wallis, offered in evidence a letter written by him to the justice, some time before the trial before him, in which he had made a statement in all respects consistent with the evidence given by him in the Circuit Court. To this evidence the defendant objected, and the objection being overruled, excepted to the opinion of the court.

I. W. Garrott, for plaintiff in error:

The introduction of the letter of Wallis to the magistrate, for the purpose of sustaining his credit after he had been contradicted by several witnesses, was error. It was proved that his testimony on the two trials, as to a material point, was different. The effort is then made to sustain him by this letter, which was not sworn to, the contents of which are consistent with his testimony given on the last trial. This cannot be done. 1 Green. on Ev. 521, § 469; Phil. on Ev. (top page) 212; Stark. on Ev. (marg.) 148; 3 ib. 1758; King v. Parker, 3 Douglass, 242; Gibbs v. Lindsay, 13 Vernn. 208; Munson v. Hastings, 12 ib. 350; Robb v. Hackley, 23 Wend. 56; Dudley v. Bolles, 24 ib. 472; Ware v. Ware, 8 Greenl. 83; Roscoe's Cr. Ev. 184, note 2; 2 Russ. on Crimes, 635.

A. B. MOORE, *contra:*

Where there is an attempt made to impeach a witness, on the ground of former contradictory statements, evidence of previous consistant statements may be given to sustain him. 2 Phil. on Ev. (C. & H's Notes,) Part 1, 777–8; 8 Conn. 93; 12 Wend. 78; 6 Har. & J. 93; 4 Binney, 201; 1 Serg. & R. 536; Washington's C. C. R. (Peters,) 203.

The case in 24 Wend., does not decide against the admissibility of such evidence in all cases. There the witness occupied a peculiar relation to the case, which is not the fact with respect to the witness Wallis. He is entirely disconnected from the matter in controversy.

GOLDTHWAITE, J.—The principal question presented in this case arises upon the admission of the letter of the witness Wallis, for the purpose of sustaining his testimony after it had been impeached, by proof that his evidence given on the trial of the same case before the magistrate was inconsistent with the facts stated by him as a witness in the Circuit Court. It is certainly true that admissions of this character, are sometimes received for the purpose of sustaining and corroborating the evidence of a witness who stands before the court in a suspicious attitude; as where he is a near connexion of the party whose interest is advanced by his testimony, if he is shown by unquestionable evidence, to have given the same account of the transaction, before the connexion, according to the ordinary course of things, could have been contemplated; the imputation, in that case, resulting solely from the position occupied by the witness, is entirely removed. So also upon accusations of rape, and perhaps some other crimes, where the mere silence of the witness might operate to cast suspicion on the facts subsequently sworn to, it is proper to prove the statement of the witness, made in consistency with the facts sworn to by him on the trial. In this case the declarations of the witness become acts, and the rule simply allows the suspicion, which might be created by the fact of silence, to be repelled by contrary proof. 1 P. Ev. 307.

The reasons applicable to the cases stated, do not, however, apply to the case under consideration. The witness in this

case stood in no peculiar attitude, to the case, or the parties. It was proved that he had made statements on oath inconsistent with the evidence given by him on the trial of the case in the Circuit Court, and this evidence is sought to be repelled by statements, consistent it is true with the facts there sworn to by him, but which, in the opinion of a majority of the court, could not upon any sound legal principle be received for the purpose of confirming his testimony. Where a witness is impeached for any cause, a collateral question at once arises for the jury to determine; that question is the degree of credit to be given to the testimony of the impeached witness. What is it that casts suspicion on him? The fact established by evidence, that he has given an account of the transaction different from that which he afterwards swears to. Does the fact, that on another occasion he stated the transaction precisely as he swore to it, disprove the inconsistency? One of the statements made must of necessity be incorrect, and the imputation which is based upon the inconsistency must continue, until the basis on which it rests is removed. To allow the inconsistency of the witness, established as a fact by sworn testimony, to be removed by his own declaration, would be a dangerous departure from that rule which requires all evidence to be given under the sanction of an oath.

We have endeavored to test the correctness of the conclusion to which the court has arrived, by the application of principle, on account of the conflict of authority in relation to the point under discussion. Upon authority, however, we arrive at the same conclusion. The first case is the one reported in 1 Mod. 282, Lutterell v. Reynell, in which the evidence of a co-trespasser, or, as insisted by some, an accomplice, the act amounting to a felony, was sustained by proof of his previous consistent statements, for the reason as stated by the court, that hearsay, although not allowable as direct evidence, might be used to show that the witness had been constant to himself, whereby his testimony was corroborated. Hawkins in his Pleas of the Crown, B. 2, ch. 46, § 14, lays down the same principle on the authority of the case from Modern. Chief Baron Gilbert in his Evidence does the same, 1 Gilb. Ev. 890; and the rule founded on that case seems to have obtained in the English Courts, until the case

of the King v. Parker, 3 Doug. 242. With that case the rule fell, and since then, the contrary has been received as the established doctrine in the courts of Westminster.

In America, the courts of several of the States still adhere to the doctrine established in the case of Lutterell v. Reynell. In Pennsylvania it was recognized in the case of Packer v. Gonsalus, 1 S. & R. 536. In Maryland it was adopted in Cooke v. Curtis, 6 H. & J. 93, and appears to have been considered as the law by Justice Washington in Wright v. Deklyne, Wash. C. C. (Peters,) 203. In most, if not all of these cases, it seems to have been regarded as the settled law, based upon the authority of the English cases, which have long since been repudiated by their own courts. The same rule, however, received the deliberate sanction of the Supreme Court of New York, in the case of the People v. Vane, 12 Wend. 68. Where the authorities bearing on, and the reason of the rule were investigated by Savage, Ch. J., who arrives at the conclusion, that although the declarations of the witness are not equal to his testimony under oath, still the fact of his having related the same story which he has sworn, tends to rebut the prejudice raised against him, by having given a contrary or different relation. The case last referred to has, however, been questioned, as sustaining the rule to its full extent, and in the case of Robb v. Hackley, 23 Wend. 50, where the correctness of the rule again came up Mr. Justice Bronson in commenting on the decision in the People v. Vane, says that it "does not necessarily go beyond deciding, that the testimony of an *accomplice* in crime may be corroborated by showing that *when first arrested* he gave the same relation of facts, which he had given on oath upon the trial." In the case last referred to, the same Judge, after a full enumeration of the authorities, adopts the rule in the King v. Parker; and in Dudley v. Bolles, 24 Wend. 465, this decision is re-affirmed. The question may, therefore, be considered as settled in New York. In Vermont, also, the rule adopted by the English Courts has been followed. See Munson v. Hastings, 12 Ver. 346; Gibbs v. Lindsey, 13 Ver. 208. So in Maine, Ware v. Ware, 8 Greenl. 82, and all the commentators on evidence since Gilbert, except McNally, have regarded the rule laid down by Justice Buller, as the correct

one. 1 Ph. Ev. 107, Cow. Ed.; 1 Stark. Ev. 108; 1 Greenl. Ev. § 469. We regard, therefore, the current of authority as sustaining the conclusion to which the court has arrived. It follows that the court below erred, in receiving the evidence objected to.

The decision of the court on this point renders it unnecessary to consider the other questions presented.

The case is reversed, and the cause remanded.

WRIGHT, USE, &c. *vs.* GRAY.

1. A *certiorari* should not be granted to remove into the Circuit Court proceedings had before a justice of the peace, when the petition does not show any reason why the petitioner did not appeal from the judgment of the justice.
2. But when a *certiorari* is awarded upon a petition which does not set forth such a state of facts as properly justifies its issuance, the Circuit Court must proceed with the trial *de novo*, without regarding the defects of the petition.

ERROR to the Circuit Court of Fayette.
Tried before the Hon. Wm. R. Smith.

E. W. PECK and EARNEST, for plaintiff in error.
E. P. JONES, for defendant.

PHELAN, J.—The court below dismissed the *certiorari*, on the motion of the defendant, upon the ground that the petition was defective and insufficient: and this is assigned for error.

Upon looking into the petition, we find no cause or excuse set forth, why the plaintiff in error, who was also plaintiff below, did not appeal from the judgment of the justice of the peace against him; and for this reason, the prayer for a *certiorari* should have been refused. But when a *certiorari* is awarded, even if it be upon a petition not setting forth such a state of facts as would properly justify its issuance, the Circuit Court, in pursuance of the plain requirements of the statute, must proceed with the trial *de novo*, without regarding the defects in the petition. The case of Casey v. Bryant, (1 Stew. & P. 51) is decisive of this case.

Let the judgment be reversed, and the cause remanded.

HUDSON *vs.* HUDSON.

1. A judgment can only be amended, or rendered, *nunc pro tunc*, when the amendment or rendition is authorized by some matter of record, or by some entry made by or under the authority of the court, which entry must be shown by the record of the cause, or at least by some book belonging to the office of the court, and required by law to be there kept.
2. A paper, purporting to be a final decree, ascertaining the amount in the hands of the administrator, and the share of each distributee of the estate, signed by the judge of the Orphans' Court, and filed among the papers of the cause, is insufficient to authorize the rendition of a decree at a subsequent term, *nunc pro tunc*, when it does not appear that it was ever recorded or entered on the minutes of the court, or that any note or memorandum of any final decree had been made in any book of the office.

ERROR to the Court of Probate of Tuskaloosa.

ORMOND & NICOLSON, for plaintiff in error.

P. & J. L. MARTIN, *contra.*

DARGAN, C. J.—On the second Monday of August, 1850, Ann Hudson, by her guardian, F. P. Hale, moved the Court of Probate of Tuskaloosa county to enter a decree of final settlement of the estate of James Hudson, deceased, against John and Nancy Hudson, administrator and administratrix of said estate, by which a sum of money was ascertained and awarded to her, and which should have been entered on the second Monday in April, 1847. In support of her motion, she introduced the record of said cause, from which it appears, that the plaintiffs in error were administrator and administratrix of said estate, and that previous to April, 1847, the estate was in progress of final settlement, and that the cause had been continued several terms previous thereto.

At the December Term, 1846, the record shows that the cause was continued until the next term of said court; and this was the last entry that appeared upon the minutes of the court, or upon any book of record; but amongst the file of papers in the cause, there appeared a paper, purporting to be a final decree, made by Samuel D. J. Moore, who was judge of said court at the time the paper bears date, by which the amount in the hands of the administrators, and the share

thereof of each distributee, was ascertained. This paper purports to be signed by the judge, and on the back of it was the following endorsement: "Decree, Estate of James Hudson; Filed 2d Monday in April, 1847. S. D. J. MOORE, Judge." It did not appear that this decree had ever been recorded or entered upon the minutes of the court, nor that any note or memorandum of any final decree had ever been made upon any book of the office. This was the only evidence introduced to show that a final decree had ever been made in the cause, and the question is, was it sufficient to authorize the court to render the decree *nunc pro tunc?*

We think that no judgment can be amended, or one rendered *nunc pro tunc*, unless such amendment or rendition of judgment be authorized by matter of record, or some entry made by or under the authority of the court, which entry must be shown by the record of the cause, or at the least, by some book belonging to the office of the court and required to be there kept by law. None of the decisions of this court go further than this, and to go one step further would, in our judgment, be productive of the most mischievous consequences. See 2 Stewart's Rep. 470; Moody v. Keenar, 9 Porter, 252; Brown v. Bartlett, 2 Ala. 29; Armstrong v. Robertson et al., ib. 164. We must, therefore, ascertain if the paper purporting to be a final decree can be considered as part of the record. I will not undertake, *at this time*, to say what papers shall be so considered before the final record is complete, and when the cause is progressing, *or as it is said, in fieri.* But I think I may say, that if the paper is not necessarily a paper in the cause, the custody of which belongs to the keeper of the records, and the record does not show that it was made so, *that is*, made part of the record by the act of the court, then it cannot be considered *a record* or a part thereof.

If we try this paper by this test, we must reject it as record evidence. No part of the record shows that a final decree was ever rendered. This is shown alone by the paper itself. Nor does the record show that this paper was ever made part of the record by the act of the court, and clearly it is not a paper *necessarily* belonging to the cause, for there is no law requiring the Probate Judge to render his decrees in writing.

He may orally pronounce his decrees, which will become the judgments of the court when transcribed on the minutes, or he may write them out and direct them to be transcribed; and possibly, if the record were to show that the decree had been rendered in writing, and the clerk directed to transcribe it, we might hold such a decree, so directed to be recorded, as record evidence. But a paper purporting to be a decree, and which is shown to be so by no part of the record, cannot be considered as part thereof. To hold that a paper, when not necessarily a part of the papers of the cause, could prove itself to be part of the record, in the absence of all other proof, would not only be an innovation upon the rules of evidence, but open a door to serious mischiefs.

Our conclusion is, that the instrument purporting to be a final settlement and decree, cannot be considered as part of the record, and consequently that the Probate Court erred in rendering the decree *nunc pro tunc*, for the reason, that excluding this paper, there is no evidence whatever that a final decree had ever been rendered.

Let the judgment be reversed.

GOVERNOR, USE, &c. *vs.* DAVIS.

1. An execution, which is levied on a crop of cotton after it has been removed from the rented premises on which it was raised, and stored in a warehouse by the tenant, is entitled to preference over an attachment subsequently levied on it at the suit of the landlord for the rent of the premises, the former levy being made in ignorance of the landlord's lien, both on the part of the sheriff and the execution creditor.

ERROR to the Circuit Court of Pickens.
Tried before the Hon. Wm. R. Smith.

This was an action of debt instituted in the name of the Governor, for the use of Bird Ivey, against the defendant in error, on his official bond as sheriff of Pickens county. The plaintiff proved that an attachment, at the suit of himself against one Wallis, had come to the hands of the defendant,

and had been by him levied on twenty-three bales of cotton, the property of said Wallis; that the cotton was raised on certain premises which said Wallis had rented from plaintiff, and that the attachment suit was founded on a note which had been given for the rent; and that the defendant had failed and neglected to make the money on an execution issued on the judgment which he afterwards recovered in the suit. The defendant, to discharge himself, proved that, before the attachment came to his hands, and after said Wallis had removed the cotton from the rented premises, and stored it in a warehouse for shipment, he had levied two executions against Wallis on the cotton, and had advertised it for sale, and that the cotton was afterwards sold, and the proceeds of sale applied to the satisfaction of these executions. The court charged the jury in substance, that the money was properly applied, under this state of facts, to the satisfaction of the executions.

HUNTINGTON, for plaintiff in error.

The only authorities to which I deem it necessary to call the court's attention, are Clay's Digest, Title Rent, and Dulaney v. Dickerson, 12 Ala. 601.

I contend that the affirmance of this judgment would be a practical abrogation of the statute. The idea that the removal of the crop changes the landlord's right, is one borrowed from the Stat. 8 Ann. c. 14, § 1, (found in Archbold's Landlord and Tenant, Law Li. top page 235) and the constructions of it by the courts. That statute provides, that the party plaintiff, before the removal of the goods from the premises under execution or extent, shall pay the rent to the landlord, with a proviso not touching this case. Of course, if the goods are once removed by the tenant, the creditor seizing them cannot pay before removal. There is, neither in England nor New York, any process of attachment given to the landlord. Not the party, but the sheriff is the one deemed liable to the landlord, and the remedy, if he he does not pay the rent, is to rule him. In a case where he desires the advice of the court, he may retain and seek instructions. 2 Johns. 478. Here we have, first, a statute after that of Anne, above referred to, and another one providing for the enforcement of

the landlord's lien by the process of attachment, which can be issued after the crop is removed, and evidently goes upon the principle that the party shall first be paid who, by the lease of his land, has enabled the tenant to provide means for his own support and that of his family, and often a surplus for his creditors. Take away this right, or fail to give it due force and effect, and public policy as well as public law would be countervened, by the difficulty of the poorer class of citizens obtaining land to cultivate.

As to the practice in England and New York under the statute of Anne, see 1 M. & S. 244; 18 Johns. 1; 2 ib. 478.

BLISS & BALDWIN, *contra.*

Referred to Clay's Digest, 210, § 45; ib. 506, § 3; Frazier v. Thomas, 6 Ala. 169; Otey, Adm'r v. Moore, 17 ib. 280; 13 N. Hamp. 46.

CHILTON, J.—The only question in this case is, whether a sheriff who levies an execution upon a crop grown on rented premises, after it has been removed from the premises and deposited in a warehouse for shipment on account of the tenant, and subsequently levies an attachment for the rent at the suit of the landlord upon the same property, is bound, upon the sale of such crop, to apply the proceeds first to the payment of the rent.

There is nothing in this case showing that there was any collusion between the creditor whose execution was levied, and the tenant, or that at the time of the levy, either the execution creditor, or the sheriff, had notice that the cotton levied on was grown upon rented premises, or that there was rent due to the landlord. The tenant, himself, removed the cotton, and after it was removed, the execution was levied in good faith upon it. These facts distinguish this case from those relied upon by the counsel for the plaintiff in error. It is said in Dulany v. Dickerson, 12 Ala. Rep. 601, "that the statute gives the landlord an effectual means of recovering his rent, by declaring a *lien* upon the crop, forbidding its removal until the rent is paid, and giving the right to levy an attachment upon it, which may doubtless be done, though the crop may be removed, and is in the hands of a purchaser from the tenant, *if he purchased with knowledge of the lien of*

the landlord." In that case, the purchaser from the tenant removed the crop, and was informed of the lien, consequently he might well have been regarded as purchasing subject to the lien. In this case, the facts are different: there is no proof showing that the creditor, whose execution was levied, had notice of the lien at the time of the levy.

The uniform construction placed by the English courts upon the statute of 8 Anne, c. 14, § 1, which is not unlike our own, is, that when the tenant removes the crop off the rented premises, the landlord's lien is gone. It is supposed that, as the process of attachment is given by our statute to the landlord, by which he may follow and levy upon the crop, the lien is not affected by the removal, as was the case under the English statute. But we think this summary proceeding was not designed to extend the lien, to the detriment of *bona fide* purchasers without knowledge, either actual or constructive, of the existence of such lien; nor was it intended to overrride other liens *bona fide* acquired upon the property, and which attached after its removal from the rented premises. The statute which says, the rent shall be exempt until the same may have been paid, &c., (Clay's Dig. 506, § 6) does not affect the case before us. The rents there referred to, evidently mean the portion of the crop to which the landlord is entitled under the contract to receive as his share, and has no application to a case where the monied rent is reserved, instead of a specified portion of the crop.

We think the lien of the execution creditor, under the facts of this case, is to be preferred, and it follows that the judgment of the Circuit Court must be affirmed.

MARTIN *vs.* BARNEY.

1. The return of a sheriff on a *capias* is the highest and best evidence of its execution, and cannot be called in question collaterally, nor be impeached or varied by parol proof. Nor will the sheriff be allowed to depose to a state of facts inconsistent with his return.

2. A party injured by the sheriff's false return on a writ of *capias ad respondendum*, has his remedy against the sheriff. Or, if the writ be returned "executed," when it in fact was not, and judgment by default goes against the defendant on a claim to which he has a good defence, chancery will afford relief.

ERROR to the Circuit Court of Perry.

Tried before the Hon. George Goldthwaite.

This was an action of debt on a judgment recoverd by Barney against the plaintiff in error and one Bell, as partners under the firm name of Bell & Martin, in the Circuit Court of Perry. The defendant pleaded 1. Nul tiel record; 2. That the writ in the case of Barney v. Bell & Martin issued after the dissolution of partnership, and notice thereof published in the newspapers of the county, and that it had never been served on him; 3. That the court had no jurisdiction to render judgment in the case of Barney v. Bell & Martin. The plaintiff demurred to the second and third pleas, and his demurrer was overruled.

On the trial, the plaintiff produced a transcript of his judgment, and rested his case. This judgment was rendered more than ten years before the commencement of the present suit, and no execution was ever issued on it. The defendant then produced the original papers in the case of Barney v. Bell & Martin, and showed by the sheriff's endorsement on the original writ that it was returned "executed 18th April, 1838, S. G. McLaughlin, sheriff." The defendant then introduced McLaughlin as a witness, who testified that he was the sheriff of Perry county at the time the writ was issued in the case of Barney v. Bell & Martin; that he received it about the day on which it issued, and returned it executed generally on the 18th April, 1838; that his best recollection was that he executed this writ, but did not recollect whether it was on Martin or Bell; that they had been partners as merchants, and that when he had executed a writ on one partner in a firm he returned it executed generally. To this proof the plaintiff objected, and the court excluded from the jury all that related to the service and return of the writ, to which defendant excepted.

The defendant also proved that he and Bell had been partners as merchants, in Hamburg, in Perry county, and that

the partnership was dissolved on the 8th April, 1837, which was before the issuance of the writ in the case of Barney against them, of which dissolution notice had been given by publication in a newspaper printed in Marion, Perry county.

The exclusion of the evidence is now assigned for error.

JOHN & MOORE, for plaintiff in error.

1. A sheriff's return must be certain; if uncertain as to any material fact, it is not good. Watson on Sheriffs, 7 Law Lib. 49; 46 ib. 282; 1 Tidd's Practice, 689. All returning officers are ministerial, and must set forth in their returns the acts done by them, so that the court may judge of their legality and sufficiency. A return that a precept had been *legally* served, or the duty enjoined by it *duly* performed, would be clearly insufficient. 12 Pick. 206; Hard. 168. The return in this case is bad, because it does not set out the acts done; it does not aver personal service on the defendants, but simply alleges a legal conclusion.

2. It cannot be objected, that if the return is false, the party injured has his remedy against the sheriff. If the court determines that this return is legal and sufficient, it cannot be illegal, and therefore cannot be false. It sets out no fact, and can be neither true nor false.

3. Service of process on one co-partner, after a dissolution of the firm, is not sufficient to authorize the rendition of a judgment against those who are not served. 4 Porter, 181; 7 Ala. 475.

4. Special matters of defence for want of jurisdiction, either of the subject matter of the suit or of the person, may be specially pleaded to an action on the judgment or record. Riddle v. Wilkins, 1 Peters, 691; 5 Johns. 37; 15 ib. 140; 5 Wend. 148. If the want of jurisdiction can be pleaded in abatement, then it follows that the facts set out in the plea may be proven.

5. The case of Cantley & Co. v. Moody, 7 Porter, 443, is not supported by a single authority from any other court. Its effect is to make a record by presumption.

I. W. GARROTT, *contra.*

1. The ruling of the court in the rejection of the evidence

was correct. Governor v. Bancroft, 16 Ala. 605; Watkins v. Gayle, 4 ib. 153; McGehee v. McGehee, 8 ib. 86; Branch Bank at Mobile v. Ford, 13 ib. 431; 3 Smedes & M. 409; 5 ib. 458; 3 Howard, (Miss.) 66. As to the propriety and completeness of the sheriff's return, see Cantley & Co. v. Moody, 7 Porter, 443.

2. Even if the testimony was admissible, the plaintiff in error was not injured by its exclusion; for it did not *tend* to prove that the original writ was not served. It amounted, at most, to nothing more than this, that the witness did not recollect whether he served the writ or not. It ought therefore to have been excluded. McKenzie v. McRae, adm'r, 8 Porter, 70.

LIGON, J.—No objection is here made to the action of the court below in overruling the demurrer, but the sole question presented for our consideration is, did the Circuit Court err in rejecting the testimony of the witness McLaughlin.

We do not think it did, for the purpose of the evidence was to prove the manner in which the writ in the case of Barney v. Bell & Martin had been served, and by this parol proof to contradict or vary the sheriff's return. It is clear that the return of the sheriff on the writ is, in its nature, both the highest and best evidence of the fact of execution, and that it cannot be called in question collaterally, or be impeached or varied by the parol proof of the sheriff, or any other person. Nor can a sheriff be allowed to depose to a state of facts inconsistent with his return. Price v. Cloud, 6 Ala. 248; Haynes v. Small, 9 Shep. 14; Lawson v. Main, 4 Pike, 184; Baker v. McDuffie, 23 Wend. 289.

If the return is untrue, the party injured has his remedy against the sheriff for a false return. McBee v. The State, 1 Meigs R. 122. Or, if the writ is falsely returned executad, when in fact it never has been served, and the party aggrieved has a good defence to the merits of the action against him, he may go into equity for relief. Crafts v. Dexter, 8 Ala. 767.

There is no error in the record, and the judgment must be affirmed.

JONES, ADM'R. *vs.* DYER AND WIFE.

1. In revising a decree of the Court of Probate, it is competent for the Appellate Court to declare the proceedings regular to a certain point, and to reverse from the point where the first irregularity or error commenced.
2. But when the decree is generally reversed and remanded, the effect of the judgment of reversal is to vacate the decree *in toto*, and the parties affected by it then stand in precisely the same position as if it had never been rendered.
3. Therefore, when a decree of the Court of Probate, rendered on the final settlement of an administrator's accounts, is generally reversed and remanded by the Appellate Court, the administrator may introduce additional evidence, on another settlement, to discharge himself of an item with which he was charged on the former settlement, and with which the Appellate Court held he was properly chargeable on the evidence then before the court.
4. To authorize the Appellate Court to reverse a judgment on account of any supposed erroneous decision of the court below, in the rejection of evidence, it must be shown that the fact intended to be established by such evidence was material to the decision of the case then under consideration before the court; and the party excepting to such decision must, in his bill of exceptions, state sufficient to show the relevancy or materiality of the alleged erroneous decision to the case under consideration, at the time such decision was made.

ERROR to the Court of Probate of Limestone.

On the final settlement of the estate of Patroclus Lewis, deceased, by Samuel J. Jones, the administrator, the latter was charged with an item of $1,200, for a balance due on a note for a large amount, made by one Samuel Jordan, deceased, and payable to said Lewis. On error brought by the administrator, the Supreme Court held that he was properly charged with that item, but the decree of the Court of Probate was reversed and remanded on account of error in another item. See 16 Ala. 221. On another settlement in the Court of Probate, the administrator offered the deposition of a witness who had not been examined on the previous settlement, for the purpose of making additional proof as to the disputed item of $1,200; but the court rejected the deposition, on the ground that the opinion and judgment of the Supreme Court previously rendered in the cause was conclusive upon the matter embraced in the deposition. The administrator excepted to the ruling of the court, and now assigns for error the rejection of the deposition, and the charging him with the $1,200.

The account which is set out in the record contains these two items of charge in favor of the estate against the administrator:

"Jan'y 1. By cash received of Mrs. Eliza Jordan on balancing accounts, allowing $250, wages *per an.* for '42, '43 and '44, to August 16, 1844, to P. Lewis, as due on the 1st January of each year, and crediting him by prin. and int. of Samuel Jordan's note to Jan. 1, '45, excepting the $1,200 claimed by administrator as a credit, and crediting Mrs. Jordan by all her accounts," &c.....

"1844, August 14. By credit of $1,200 entered on note of Samuel Jordan, (signed A. W. per instructions of P. Lewis,) less a credit of $66 08 paid by Mrs. Jordan Dec. 12, 1842, and interest to August 14, 1844, and a credit of $37 87, paid by S. J. Jones, June 14, 1844, and interest to August 14, 1844, leaving a balance of.....$1,081 53"

The contents of the deposition are set out in the opinion.

C. C. Clay, Jr. for plaintiff in error:

1. The judgment of the Supreme Court reversing and remanding the cause was equivalent to granting plaintiff a new trial; the parties were thereby placed in the position in which they were before any judgment was rendered. Dupuy v. Roebuck, 7 Ala. 484; Simmons, Adm'r. v. Price, Adm'r. 18 ib. 405.

The cases of Johnston v. Glasscock (2 Ala. 218) and *Ex Parte* Sibbald, (12 Peters, 488,) are unlike this. In each of those cases the Supreme Court rendered a final decree, and only remanded the cause that the primary court might execute their decree. But here no final decree was rendered, no part of the decree was affirmed, it was reversed generally, and the cause remanded.

2. It cannot be objected that the relevancy of the testimony does not appear from the record. The question of relevancy was not raised in the court below; the court decided that the plaintiff was concluded from offering any evidence. Robertson's Exrs. v. Allen, 16 Ala. 108; Smith v. Armistead's Exrs. 7 Ala. 700.

3. The relevancy and materiality of the deposition are shown. The objection to it admits its relevancy. It asserts that the judgment of this court was "conclusive on the matter embraced in the deposition," thereby conceding that it referred to the matters already in issue between the parties. The account current set out in the record also shows its relevancy. That account contains an item of charge against the administrator, which corresponds in date, amount, and other particulars, with the note described in the deposition.

The materiality of the deposition, and the injury done to plaintiff by its exclusion, are fully shown by the opinion of this court, (16 Ala. 224,) to which the objection refers. That opinion is the law of this case, and (since the court is bound to know its own opinions and judgments,) it was unnecessary to incorporate it in the bill of exceptions. That opinion will show that the deposition offered contained the very evidence which was wanting on the former trial.

R. C. Brickell, for defendants in error:

1. The record does not show that the testimony rejected by the Court of Probate was material, or relevant to any issue before that court. If the account of the plaintiff in error, which was audited by the court, is examined, no item will be found to which the rejected testimony could apply. This rule is well settled, that a party excepting to the rejection of testimony must show, that the testimony rejected was not only admissible, but material and relevant to some issue pending before the court, 11 Wendell, 428: 1 Leigh, 216: 1 Cranch, 152; 1 Ala. 582.

2. Again: it is well settled that an error which works no injury, furnishes no ground for the reversal of a judgment. Can the court say, from an examination of this record, that the rejection of the testimony by the court below operated to the prejudice of the plaintiff in error? If so, let him lay his finger on the item which should not have been charged against him if the testimony had been admitted. The reason assigned by the court for the rejection of the testimony is immaterial. If a court arrives at a proper conclusion, the reasons which it assigns may be erroneous, and yet they will furnish no ground of reversal. But the plaintiff in error insists, that

the court should refer to the record of this case when here at a former term. That every court is bound to take notice of its own judgments, and that the court will refer to its former judgment to ascertain whether the Court of Probate erred in the effect which it ascribed to that judgment, is not denied. But this court will hardly look to the state of facts exhibited by that record, and presume that the same state of facts was before the Court of Probate upon the last trial. This the court is asked to do, in order to find ground for the reversal of a judgment. Now, if the testimony offered was only relevant and material, when taken in connection with other facts, the other facts should have been shown in the court below. The bill of exceptions would not have been evidence in the Court of Probate. 2 Cowen & Hill's Notes, Title, Bills of Exceptions.

Again: if the court should look to that record, and presume that the state of facts then existing also existed at the last trial, would it not violate the rule, that all presumptions are to be indulged in favor of a judgment, and none against it?

3. Did the Court of Probate err in rejecting the testimony for the reasons assigned? We insist that the judgment of the Supreme Court was conclusive on all points settled by its decision, and that when the cause was remanded to the Court of Probate, nothing remained for that court to do, but to make a decree conforming to the decision of the Supreme Court. Johnston v. Glasscock, 2 Ala. 218; *Ex Parte* Sibbald, 12 Peters, 488.

GOLDTHWAITE, J.—The only question presented by the record arises upon the rejection, by the Orphans' Court, of the depositions offered in evidence. The ground of objection taken to the admission in the court below, and which has been insisted here, was that the action of the Orphans' Court, upon the subject matter of the deposition, was concluded by the opinion and judgment of this court in the same case, rendered June Term, 1849, 16 Ala. Rep. 221; and that in reality nothing remained for the action of the Probate Court, except to render a decree in conformity with the decision of this court. There can be no doubt but that the court to which the case is remanded, is bound to proceed according to

the principles of law determined by this court in the same case, and we have no doubt also, that in revising the proceedings of the Orphans' Court, it is competent, in a proper case, for this court, by its judgment, to declare the proceedings regular to a certain point, and reverse from the point where the irregularity or error commenced. This was done in the case of the Executors of Sankey v. The Heirs of Sankey, 6 Ala. Rep. 607, and we see no reason to question the correctness of the practice; but in the case under consideration this course was not pursued. The court, it is true, held that the Orphans' Court had committed no error in charging the administrator with the particular item, which is the subject of contest in the present case, but that there was error in relation to other items in the same account, and for those errors the decree rendered by the Orphans' Court was reversed, and the cause remanded. The effect of the judgment of reversal, was to vacate the decree *in toto*, and the parties affected by it stood in precisely the same position as if it had never been rendered. Simmons, Admr. v. Price, Admr., 18 Ala. Rep. 405; Dupuy v. Roebuck, 7 Ala. Rep. 484. The cases relied on by the defendant in error to sustain the judgment on this point, Johnston v. Glasscock, 2 Ala. Rep. 218, and Ex parte Sibbald, 12 Peters 488, are clearly distinguishable in principle from the case under consideration; in both of these cases the judgment of the court below was not merely reversed, but *a final decree* was rendered by the Appellate Court, and the cases were remanded for execution alone. In the present case no decree was rendered, but the judgment of the court below was simply reversed and remanded. Upon the authority of the cases which we have cited, it follows that upon the reversal of the judgment the rights of the parties were restored to the same condition as before its rendition, and that when the same item was again presented for settlement, the administrator had the right to offer evidence to show that the charge should not properly be made against him.

It is, however, urged that on an examination of the evidence rejected, it will be seen that it was applicable to no issue before the court, and was, therefore, properly rejected on the ground of irrelevancy. We understand the rule to be, that to authorize a court of error to reverse a judgment, on

account of any supposed erroneous decision of the court below, in the rejection of evidence, it must be shown that the fact intended to be established by such evidence was material to the decision of the case then under consideration before the court; and the party excepting to such decision must, in his bill of exceptions, state sufficient to show the relevancy or materiality of the alleged erroneous decision to the case under consideration at the time such decision was made. Stone v. Stone, use, &c., 1 Ala. 582. Testing the materiality of the evidence offered and rejected by this rule, we find by reference to the record, that on the final settlement, the estate of the intestate was credited (which amounts to a charge against the administrator) with an item amounting, with interest, to $1580 28. This item is stated in the account in these words: "1844, *August 14th.—By credit of twelve hundred dollars, entered on note of Samuel Jordan (signed A. W. per instructions of P. Lewis,*") &c., and in the same account and on the same side, another item thus stated: "By cash received of Mrs. Eliza Jordon, on balancing accounts, allowing $250 wages per annum for 1842, 1843 and 1844, to August 16th, 1844, to P. Lewis, as due on 1st January each year, crediting him by principal and interest of *Samuel Jordan's note to 1st January,* 1845, *excepting the* $1200 *claimed by administrator as a credit, &c.*" The evidence offered is to the effect, that a note was held by the intestate on Samuel Jordan. That after the death of Jordan, Mrs. Eliza Jordan, on the 14th August, 1844, gave her note for twelve hundred dollars, payable to the plaintiff in error, which amount was entered as a credit on Samuel Jordan's note, and the note of Mrs. Jordan delivered to the plaintiff in error, and that the credit was entered, the note executed and delivered to the plaintiff in error by the direction, and with the consent of the intestate. It is impossible to doubt in relation to the applicability of this evidence to the item of $1580 28, which was charged against the administrator, and on which the decree rendered against him was in part founded. There was, it is true, no express issue appearing upon the record, but the case was the final settlement of the accounts of the administrator, and the statement of the items composing that settlement, when taken in connection with the evidence offered, show clearly its relevancy to the case then under consideration.

The relevancy and materiality of the evidence offered being shown, it follows that the Probate Court erred in rejecting it, and as the question as to its sufficiency does not properly arise on the record as now presented, we have only to add that the judgment is reversed, and the cause remanded.

WOODWARD *vs.* PURDY.

1. In an action to recover damages for injuries done to plaintiff's hogs, which had broken into defendant's enclosure, the defendant cannot *recoup* for damages done to his crop by the hogs, when it is shown that his fence was not a "lawful fence" agreeably to the statute.
2. The court may, in its discretion, refuse a motion to have a person, who is about the court, but has not been subpœnaed, brought in to testify as a witness in a cause.

ERROR to the Circuit Court of Walker.

Tried before the Hon. Wm. R. Smith.

This was an action brought by Purdy against Woodward before a justice of the peace, to recover damages to an amount under $20 for injuries done to plaintiff's hogs in worrying and tearing them with dogs. The justice of the peace, with a jury below, gave judgment for the plaintiff for $1 42 and costs. The defendant appealed to the Circuit Court.

In the Circuit Court, as shown by the bill of exceptions, the defendant offered to prove the injury that plaintiff's hogs had done to defendant, by breaking through his fence and destroying his crop at the time he set his dogs upon them, by way of *recoupment;* this the court refused to permit. It was shown that defendant's fence was not such as the statute calls a "lawful fence," at the time the hogs broke in.

The defendant asked permission of the court to have one Jacob Stover, who had not been subpœnaed, but who was attending court, and was at that time out upon a jury, to be "called and brought into court," stating that said Stover was a material witness for him in the cause. This the court refused.

The refusals of the court as aforesaid are severally assigned for error.

PETERS, for plaintiff in error.

1. By the common law, the owner of cattle could not permit them to run at large and trespass on the grounds of other persons. And if he did so, such owner generally was liable for the injuries thus committed in an action of trespass. 1 Chit. Pl. 82, 83, and notes; 16 Mass. 33; 4 Met. 589; 19 John. 385; 3 Wend. 142; 1 Denio, 101; 16 Conn. 200; 5 Greenl. Rep. 357.

And the owner of the crops or grounds thus trespasse upon, could legally drive away the cattle *damage feasant* from his ground, by such means and such force as might be necessary for such purpose. 18 V. & R. 425; 7 U. S. Dig. 274; 12 Ala. 840.

But, if in driving such cattle off, more force was used than was necessary for that purpose, and injury resulted from it to the owner of the cattle, he would be entitled to damages on account of the injury resulting from the excess of force. 12 Ala. 840.

And if the crops or grounds on the one hand, and the cattle on the other, were injured, it would be a case of mutual damages arising out of the same transaction; and in a justice's court particularly, where the jurisdiction excludes both law and equity. Such a case would involve the proper application of the law of *recoupment.* 13 Ala. 587; Clay s Dig. 315 § 12; 3 Ala. 756.

2. The parties have a right to enforce the attendance of their witnesses in court, if within the jurisdiction. In criminal cases this is certainly the law. And in both criminal and civil cases it is a right expressly or impliedly secured by constitutional law and enforced by statute; and the witness may attend either with or without a subpœna. Const. of Ala. Art. 1, §§ 10, 14; Clay's Dig. 602, § 17.

But the law which secures the attendance of the witness in court also secures the more important right, viz, the use of his testimony when there; else the incident takes precedence of the principal. And where a party has a right given and secured by statute and the constitution, it is not within the

discretion of the court to defeat it. 3 Chitt. Genl. Pr. 51, note d; Coke Litt. 152 a; 151 b; 6 Bing. 63.

It is no sufficient reason for the refusal of the court to allow the witness to be called, that he was out on a jury. A jury may be allowed to separate and meet again, and this does not vitiate the verdict. 2 Bailey Rep. 565; 3 How. 52; 1 Dev. & Bat. Rep. 500; 3 Cow. Rep. 355; 1 ib. 221.

This could not be a matter of discretion; and if so, it is subject to revision for an improper exercise. If, in the action of the court below, the party complaining is injured, he is entitled to reversal. Clay's Dig. 307 § 5; 4 Phil. Ev. (C. & H.) 774, note 403, and cases cited there.

EARNEST, *contra.*

1. Recoupment only applies where there are cross demands arising from the same contract. Hatchett v. Gibson, 13 Ala. 594, and authorities there cited.

2. It was discretionary with the court to grant or refuse the motion to have the witness "brought in to testify;" and being discretionary, the action of the court cannot be revised. Massey v. Steele's adm'r, 11 Ala. 340; Cobb v. Miller & Co. 9 ib. 499.

PHELAN, J.—From the facts stated in the bill of exceptions, the fence of the plaintiff in error, Woodward, was not a "lawful fence," agreeably to the statute, (Clay's Dig. 241,) at the time the defendant's hogs broke into his enclosure. The defendant's right of action, for the injury done to his hogs by the plaintiff's dogs, depended indeed upon this point. Under such a state of facts, no action would lie of course in favor of Woodward for the injury done to his crop by plaintiff's hogs; and if no action would lie, it was clearly not a case for *recoupment*, and the Circuit Court did not err in rejecting the testimony offered by Woodward to show damage of that kind.

The next assignment is, that the court erred in refusing to allow a witness of the defendant, who was about the court, to be "called and brought into court;" for it is stated that the request or motion was in that form; and this, although it appears that the witness had not been subpœnaed. Nothing is

clearer than that a court in its discretion may refuse such an application.

There is no error in the rulings of the court, and the judgment is affirmed.

JONES & BLAIR *vs.* BURDEN.

1. When the decree of sale, in a suit for the foreclosure of a mortgage, authorizes the register to receive the amount bid and to make a conveyance, the bidder must be considered as the purchaser, from the time he receives a deed from the register. From that time the property is at his risk, and he cannot repudiate the contract, although the sale may be set aside, before confirmation, for irregularities.
2. A judgment creditor may redeem lands sold under a decree of foreclosure, *before the sale is confirmed*, when the purchaser has paid the price and received a deed from the register.
3. A purchaser who would prevent a redemption of the lands by a judgment creditor, by crediting the debtor with the amount proposed to be advanced, must also be a *judgment* creditor.
4. The death of the judgment debtor after the sale under decree, does not affect the judgment creditor's right to redeem, although the lien of his judgment may be thereby lost.

ERROR to the Chancery Court of Mobile.
Hon. J. W. Lesesne, presiding.

The facts of this case, as they are exhibited by the bill, answer and exhibits, may be thus stated: William Jones, one of the plaintiffs in error, as executor of Hiram Cheesborough, deceased, filed his bill in the Chancery Court of Mobile, to foreclose a mortgage executed by John Mayrant and wife, on certain real estate described in the pleadings of this case, and at the April Term, 1848, obtained a decree of foreclosure, by which the Register was directed to sell the land in the same manner that sheriffs are required by law to sell real estate. By this decree the mortgage debt was ascertained to be $20,944. In June, 1848, the Register sold the land for two hundred and sixty dollars, and Jones (the executor) and Henry H. Blair, became the purchasers. The Register executed

to them a deed, and they took possession of the land; but the sale has never been confirmed by the Chancellor, nor does it appear that the Register ever made a report of his sale to the court. Mayrant and wife died subsequent to the sale, and the suit was ordered to abate. The amount bid at the sale, less the costs, was entered as a credit on the mortgage debt, the balance of which is still unpaid.

The complainant in this bill obtained a judgment at law against John Mayrant, in 1840, for the sum of seventeen hundred and fifty-eight dollars, besides costs of suit, upon which execution was issued, and returned in April, 1841, "no property found." The complainant having tendered the purchasers the amount bid for said land at the sale, together with ten per cent. per annum thereon, filed this bill to redeem the land, under the act of 1842. The complainant's right to redeem was resisted on two grounds: First, that the sale was not perfect and complete, because it had never been confirmed by the Chancellor; secondly, Jones, the executor of Cheeseborough, offered to credit the mortgage debt with more than the amount offered by the complainant. The Chancellor, however, decreed in favor of the complainant, and the cause is brought to this court by writ of error.

CAMPBELL, for plaintiffs in error:

The cause was submitted on bill and answer by consent. The facts of the answer are thus admitted to be true, as therein stated. This answer shows, that before the tender, Mayrant had died, and that the suit in chancery abated. There never was a decretal order confirming the sale.

No title vested in the plaintiffs until the decree of confirmation; 8 Ala. 876; 6 ib. 411; 1 ib. 475; 2 ib. 256; 6 ib. 411; 1 S. & Marsh, 622.

The tender of the money was made prematurely by the defendant; 4 Humph. 371; 10 Yerger.

The defendant had lost his privilege of redemption by the death of Mayrant, and the consequent destruction of his lien. 12 Ala. 309.

ADAMS, for defendant:

1. Defendants say that the defendant Jones had a decree,

as executor, against Mayrant, and that both Blair and Jones offered to credit on it, according to the mortgage. Waiving the difficulty of both these parties allowing this credit, on a decree belonging to one, and also the incongruity of Jones making the credit as executor, so as to sustain his individual purchase, it is sufficient to object that a decree in equity is not such a debt as the statute contemplates. 12 Ala. 367.

2. That the sale wanted confirmation. The answer is, it was the duty of the purchasers themselves to have it confirmed; 2 Dan. Ch. Pr. 1455. A party who purchases under a judicial sale, and goes into possession, is estopped from denying title, 3 P. 126; 4 Ala. 21; 6 ib. 402; Brown v. Isbell, 11 Ala. 1015, 1022, in which case the Tennessee authority was cited, but disregarded by the court. The decree of sale directs this mode of sale, as by sheriff's sales. See Clay's Dig. 205, § 17.

DARGAN, C. J.—The plaintiffs in error contend that their purchase was incomplete, notwithstanding the Register executed to them a deed for the land, and that until the sale was confirmed by the chancellor, no judgment creditor of the mortgagor could file a bill to redeem. The solution of this question depends on this: at what point of time is the bidder to be considered the purchaser of real estate, sold under a decree of foreclosure? In England he cannot be considered as the purchaser until the sale has been confirmed by the Chancellor; for until then, the property is not at his risk, and if it be destroyed in the interim between the bidding and the confirmation, he cannot be compelled to take it. 2 Dan. Ch. Pr. 1455; Ex Parte, Minor, 11 Vesey, 559; 13 Vesey, 517; Sugden on Vendors, vol. 1, 60.

But a practice has grown up in this State different from the practice in England. There the bid is reported by the master to the Court of Chancery, but the purchase money is not paid, nor any conveyance executed to the purchaser, until the report of the master is confirmed; but here the purchase money is paid to the Register at the time of the bidding, and he, unless directed by the order of sale to the contrary, then executes and delivers to the purchaser a deed for the premises. This was the course pursued in the case before us, and

the purchasers obtained the possession of the land, and have occupied it ever since; and if we were to hold that it required a confirmation of the sale in order to render them purchasers, they have it in their power forever to prevent a judgment creditor of the mortgagor from redeeming, for they may decline to have the sale confirmed, and a judgment creditor has no power to compel them; and thus, from their own neglect in not procuring a confirmation of their purchase, they would reap a benefit. We think that, under the practice which has grown up in this State, we must hold the purchase complete from the time the bidder pays the purchase money, and receives a conveyance from the Register. From that period the property is at his risk, and he could not repudiate the purchase for anything afterwards intervening.

It is not, however, to be inferred that we intend to hold that the bidder, by paying the amount bid and receiving a conveyance, obtains an indefeasible title without a confirmation; for the practice is well settled, that the sale may be set aside before confirmation, for improprieties or irregularities in the sale. All that we intend to say is, that when the decree authorizes the Register to receive the amount bid, and make a conveyance, the bidder must be considered as the purchaser from the time he receives a deed. The case cited by the plaintiff's counsel from 4 Humphreys, Wood, Abbot, et al. v. Morgan, Allison et al. it is true is opposed to this view, but the practice in Tennessee corresponds with the English practice in this particular; the purchase money is not paid, nor is the deed executed, until there has been a confirmation of the sale; hence we do not consider that case as an authority in point. Nor can we assimilate sales under the decrees of Courts of Chancery, to sales by commissioners acting under the authority of the Orphans Court, for in such cases no conveyance is directed to be made until the report of the commissioners has been returned. The commissioners (unless, perhaps, they are otherwise directed by the order of sale) have only the authority to sell the land, and not the authority to execute a conveyance; the bidder, therefore, at such a sale, does not obtain the legal title until the commissioners report the sale to the Orphans' Court, and receive from that court the authority to convey, Bonner v. Greenlee's Heirs, 6 Ala.

411. But under the chancery practice that has grown up in this State, and from which we do not feel at liberty to depart, the Register may execute a conveyance upon receiving the amount bid, before he reports the sale to the Court of Chancery, and from the time the bidder receives his deed, the property is at his risk, and he cannot repudiate his contract; from that time, therefore, he must be considered as the purchaser, invested with the legal title, notwithstanding his title is liable to be divested for irregularities in the sale.

It follows from this view, that a judgment creditor may redeem before the sale is confirmed, for the purchaser is not compelled to have it confirmed, and may enjoy the property without a confirmation. The only effect that the confirmation can have under our practice is, to render the title of the purchaser indefeasible, that is, not liable to be set aside by the Chancellor, but he must be considered as the purchaser from the date of his conveyance.

The only remaining question is, whether the offer of Jones to credit the mortgage debt with the amount proposed to be advanced by the complainant on the amount of the sale, deprives the complainant of his right to redeem. The decisions of this court *have* settled the question that a *bona fide* creditor, within the meaning of the act of 1842, is a judgment creditor; and although there may be an actual debt due to one, he cannot redeem the land of his debtor that has been sold under judicial process, without showing that his debt has been reduced to judgment. The Branch Bank at Mobile v. Furness et al. 12 Ala. 367; Thomason v. Scales, ib. 309; Pollard v. Taylor, 13 Ala. 604.

From this it must follow, that a purchaser who would prevent a redemption, by crediting the debtor with the amount proposed to be advanced, must also be a judgment creditor. We cannot construe the term *bona fide* creditor, as used in the second section of the act of 1842, to mean a judgment creditor, and the same term in the third section to mean a creditor at large, or one who has an actual debt, whether reduced to judgment or not. The Legislature evidently used the words in the same sense in both sections of the act, and we must construe them to mean the same, whether found in the second or third section.

Nor can the objection avail the plaintiffs, that the death of Mayrant destroyed the lien of the complainant's judgment; for, notwithstanding the lien may be lost, the judgment remains, and the complainant is a judgment creditor.

We can see no error in the decree, and it must be affirmed.

JEFFRIES *vs.* HARBIN, ET AL.

1. A justice of the peace has no jurisdiction of a suit against the commissioners of the sixteenth section, for a refusal on their part to pay over to a legal voter of the township, his proportionate share of the school fund.
2. Where the subject matter of the suit is without the jurisdiction of the court, consent of parties cannot confer such jurisdiction; and much less can it be be conferred by mispleading.

ERROR to the Circuit Court of Fayette.

Tried before the Hon. William R. Smith.

WILLIAM S. EARNEST, for plaintiff in error.

P. & J. L. MARTIN, *contra.*

CHILTON, J.—This was a proceeding commenced before a justice of the peace, by the plaintiff in error, against the defendants, as commissioners of section 16, in township 16, in range ten West, &c., to recover from the said defendants, as the cause of action is endorsed on the warrant, "his proportionate share of the sixteenth fund, belonging to said township, for the year 1849."

The justice gave judgment in favor of the plaintiff, for the sum of twenty-four $\frac{40}{100}$ dollars, from which the defendants appealed to the Circuit Court, and plaintiff filed in that court his statement, as follows: "State of Alabama, Fayette county, Circuit Court; Term 1850; Appeal from ——. Jeffries states that L. B. Harbin and Benjamin Jones, commissioners of 16th section, Township 16, Range 10, are justly indebted to him in the sum of twenty-four dollars and forty cents, for his proportionable part for tuition for the year 1849, for scholars actually sent to school by him, which they refuse to pay."

To this statement there was a demurrer, which was sustained by the court, and the plaintiff failing to amend, judgment final was rendered against him, for cost, from which this writ of error was sued out.

The question which first naturally arises, is, had the justice of the peace any jurisdiction over this case? If he had not, it is wholly immaterial, for what cause the Circuit Court repudiated the jurisdiction, since it could not have proceeded to judgment, however formal the statement may have been.

It is very clear, that, aside from the statutes upon the subject, the plaintiff could have no action at law against these defendants. Whether a bill in chancery would lie to compel the performance of the trust, is not a question now before us. Since, then, the action is given by the statute, the court must have a warrant by the statute for its action, otherwise, its proceeding is *coram non judice*, and void. A remedy is given, where the funds are withheld by the commissioners, on motion of any legal voter of the township where the funds have been so withheld, in the regular Orphans' Court of the county, which, by its citation, is required to bring the commissioners before it *instanter*, to show cause why judgment should not be entered against them and their securities for said default. No other remedy has been given, and certainly none before a justice of the peace. Whether this remedy has been preserved, by being transferred to the Probate Court since the abolition of the Orphans' Court, it is not necessary for us to decide. It is certain, that no statute gives jurisdiction to the justice, and as every justice's court is dependent upon the statute law for all the civil jurisdiction which it may legitimately exercise, having no common law jurisdiction in civil matters, it follows that the justice had no power over this proceeding. This is not a case where the want of jurisdiction must be pleaded in abatement. Where the subject-matter of the suit is without the jurisdiction of the court, consent of parties cannot confer such jurisdiction; much less would it be conferred by mispleading. In such cases, it is the duty of the court to repudiate the cause, *mero motu.*

Let the judgment be affirmed.

McCULLOUGH AND WIFE ET AL. *vs.* WALKER AND WIFE.

1. Under the statute laws of North Carolina, a parol gift of slaves is null and void.
2. When a party has a legal title and an unembarrassed legal remedy, chancery will not take jurisdiction.

ERROR to the Chancery Court of Tuskaloosa.

Tried before the Hon. W. W. Mason.

Walker and Wife filed their bill against the plaintiffs in error, setting forth that John B. Williams married Winifred, daughter of Samuel Hayes, in the State of North Carolina, about the year 1823; that said Hayes, before Williams left that State, put him in possession of a negro girl named Hannah, declaring that he did not give said girl to Williams, but placed her in his possession for the benefit of such children as his daughter, Winifred, should have. Immediately after this, Williams removed his wife and the slave to Alabama, where his wife gave birth to a daughter, now the wife of the complainant, Walker. Mrs. Williams shortly afterwards died, and Williams married a Miss Spencer, and died. His widow administered on his estate, sold the girl Hannah as the property of the estate, and became the purchaser herself. During her widowhood, the last Mrs. Williams (now Mrs. McCullough) sold the slave to one Windham, but kept possession of her. After this, she intermarried with the defendant, James McCullough, who took possession of Hannah and her increase, and still holds them. It is charged that the sale and purchase by Mrs. McCullough were fraudulent, as was also the sale to Windham; that they each purchased with a full knowledge of the condition of the title of the slave, and held as trustees for Mrs. Walker. The bill also sets up a deed of gift for Hannah and four children, who are named, made by Samuel Hayes to Mrs. Walker, bearing date 11th January, 1843, and the complainants set up title under this deed also.

The defendants answer jointly, denying all the material allegations in the bill, and insist that by the laws of North Ca-

rolina, to which they refer, the parol gift of the slave was null and void. They also demur.

It is not necessary, under the view taken of the case by the Court, to set out all the proof: it is sufficient to say, that two of the complainants' witnesses prove that Samuel Hayes loaned the girl Hannah to his daughter, Winifred, for life, and at her death, the slave was to go to her children. This was done in the State of North Carolina and by parol. The defendants offered in evidence the law of North Carolina, regulating gifts of slaves, which is in these words:

"Act of 1806, c. 701, §§ 1 and 3. No gift hereafter to be made of any slave shall be good or available, either in law or equity, unless the same shall be made in writing, signed by the donor, and attested by at least one credible witness subscribing; neither shall such gift be valid, unless the writing by which any slave is transferred, shall be proved or acknowledged as conveyances of land, and registered in the office of the public register of the county where the donee resides, within one year after the execution thereof, if the donee be in actual possession of the slave so given and transferred: but if under any special agreement made at the time of the gift, the donor shall remain in possession of the slave so given, then the writing transferring or conveying the said slave shall be proved or acknowledged as aforesaid, and registered within the same time, in the county where the donor resides: *Provided*, That where any person shall have put into the actual possession of his or her child or children, any slave, and the said slave shall remain in the possession of such child or children, at the time of the death of such person, he or she dying intestate, such slave shall be considered as an advancement to such child or children, and be regulated by the laws now in force relating to advancements made to children by a parent in his lifetime."

E. W. Peck, for plaintiff in error.
P. & J. L. Martin, *contra.*

LIGON, J.—The case made by the bill, answers, and proof, does not authorize the relief sought. It can be only regarded, so far as the first part of the bill is concerned, as an attempt to establish a parol gift of a slave, made in the State of North

Carolina, after the passage of the act of 1806, which, in express terms, declares such gifts null and void, both in law and equity. It is true, the bill does not set up that the slave was given absolutely to Mrs. Williams or her husband, but it describes the transaction in such terms as to show that Hayes, the donor, intended that the whole estate in the slave should pass out of himself, and is thus equivalent to an absolute gift.

The courts of North Carolina have repeatedly construed this act, and have declared parol gifts of slaves to be void, in much stronger cases in favor of their establishment than the one we are now considering. In the case of Bennett v. Flowers, (1 Dev. & Bat. 467) a father-in-law made a parol gift of slaves to his son-in-law, who, dying, bequeathed them to the donor's grand-children, with his consent, and by his directions; yet, under the act of 1806 above quoted, the Supreme Court of that State held, that the title was still in the father-in-law, and that he might resume the possession of the slave at any time. To the same effect is the case of Hamlin v. Alston, 1 Dev. & Battle, 479.

The deed of gift referred to in the bill, as made by Samuel Hayes to Mrs. Walker in 1843, does not strengthen the claim of the defendants in error to relief in equity. If that deed is operative for any purpose, it vests the entire legal estate in the slaves in Mrs. Walker, and she should have asserted her rights under it in a court of law, and not in equity, unless the bill contained other allegations than are found in this one. Baker v. Rowan, 2 S. & P. 361.

The demurrer having been overruled by the Chancellor, and his action in this respect not being assigned as error, we deem it unnecessary to consider that part of the case.

The decree of the Chancellor must be reversed, and the bill be here dismissed, without prejudice, the defendants in error paying the costs of this court, and the court of chancery.

MURRAH *vs.* THE BRANCH BANK AT DECATUR.

1. When the record contains a bill of exceptions signed and sealed in term time, and also other exceptions which are without date, with nothing on their face to to show at what time they were taken, and entirely disconnected from the first bill of exceptions, but purporting to have been taken "during the further progress of the cause," the latter will be rejected as forming no part of the record.
2. In a suit by the Bank against the maker on a promissory note purporting on its face to have been given for the amount of the maker's indebtedness to the Bank, evidence is admissible to show that the agreement which constituted the consideration of the note was the extinguishment of the debt of another person to the Bank, and that the proceeds were so applied.
3. When evidence is objected to as a whole, the court is not bound to exclude any part of it unless the whole of it is inadmissible.
4. The question whether the Bank exceeded its powers, by taking more than legal interest in the note sued on, cannot be raised for the first time in the Appellate Court, when the only error assigned relates to the admission, against the objection of the plaintiff in error, of certain evidence touching the consideration of the note.

ERROR to the Circuit Court of Morgan.

Tried before the Hon. S. C. Posey.

This was a motion by the Bank for judgment against the plaintiff in error, on a promissory note of which the following is a copy:

"We, Amos B. Murrah, as principal, and Wm. H. Sale and Murrah & Gamble, as securities, jointly and severally promise to pay to the Branch of the Bank of the State of Alabama at Decatur, two thousand dollars, payable as follows: twenty-five per cent. on the 30th day of June, 1838; thirty-seven and a half per cent. on the 30th day of June, 1839; and the balance on the 30th day of June, 1840; with interest on the whole, also payable at said times, at the rate of eight per cent. per annum from this date; being an amount the said Amos B. Murrah is indebted to the said Branch Bank, time for the payment of which is thus extended, under the provisions of the second section of an act of the General Assembly, passed at the called session of 1837, entitled," &c., "Dated Limestone county, September 27, 1837," (signed) "A. B. Murrah, principal, Wm. H. Sale, security, Murrah & Gamble, security."

The defendant proved at the trial, by an officer of the Bank, that he had made a full examination of the books of the Bank, and that he could not find any record whatever that said Amos B. Murrah owed said Bank anything at the date of said note. Defendant also proved that he was not a member of the firm of Murrah & Gamble. The plaintiff then offered to prove, that said note was taken by said Bank, and applied to the payment of debts due to it by Murrah & Gamble, and that a memorandum on the note, in these words: "Proceeds of this note to be applied to the payment of Murrah & Gamble's bill," was in the handwriting of James K. Murrah, one of the members of the firm of Murrah & Gamble. Plaintiff also introduced a check, (which is not set out in the record on account of its loss,) signed by defendant, and proved that the body of it was in the handwriting of an officer of the Bank; that he did this by the direction of said James K. Murrah, who handed him said check; that so far as said officer knew, said A. B. Murrah never knew of the application of said note, or of the manner in which said check was filled up, or that he ever assented thereto afterwards; and that it was the custom of said Bank, established by about twenty-four cases of the kind, to take notes of this description, and apply them to the payment of the debts of other persons, when the makers owed the Bank nothing. To the introduction of all which evidence defendant objected, but his objection was overruled, and he excepted.

The foregoing facts are set out in a bill of exceptions, which was signed and sealed by the presiding Judge in term time. The record also contains an additional exception, which is in these words: "During the further progress of this cause, the court charged the jury, that if they believed the note sued on was given in extension of the debt of Murrah & Gamble, then defendant was liable, although he did not himself owe the Bank anything. To which opinion of the court the defendant excepts, and now here tenders this, his bill of exceptions, which he prays may be signed, sealed and made a part of the record, which is done." (Signed) "S. C. Posey." (Seal.) A motion was made by the defendant in error, to strike the second exceptions from the record.

James Robinson, for plaintiff in error.

The proof offered and objected to should have been excluded by the court for two reasons:

1. Because the consideration of the note, as shown by the proof, was different from that stated in the note. Parol proof is not received to contradict the consideration stated in a written instrument. Wood v. Stegar, 5 Porter 498; Johnson v. Ballow, 2 Porter 29; 10 Ala. 548; Murphy v. Branch Bank at Mobile, 16 Ala. 94; 2 Phil. Ev. 1460; 3 Stark. Ev. 1004.

2. Because the act of the Bank in taking this note was illegal and void. At the execution of the note A. B. Murrah owed the Bank no debt; and as he did not owe the Bank, it had no power to take a three years' note and charge an interest at the rate of eight per cent. Clay's Digest 94, § 3, 90, § 4.

The Bank is the creature of the statute, and can exercise no powers except those expressly given it by the statute; and being so, if it exceed the powers so given, its whole act is illegal and void. Springfield Bank v. Merrick, 14 Mass. 322; Thalimer v. Brinkerhoof, 20 John. 397; Beaty v. Knowler, 4 Peters 168; Bates & Hines v. Bank of Alabama, 2 Ala. 459; Bank of United States v. Dandridge, 12 Wheat. 64; Bank of Augusta v. Earle, 13 Peters 587; New York Insurance Company v. Ely, 5 Conn. 561. Then in charging eight per cent. the Bank exceeded its power.

Again: under the act of 1337, Clay's Digest 112, § 51, the Bank could take a three years' note only in extension of a *pre-existing* debt. It could not, by one and the same transaction, create a debt and extend it to three years. And that act authorized it to take the note of the *debtor himself* in extension of the debt; but did not give it the power to take in extension the note of any other person than the debtor.

Now it is wholly immaterial whether this proof was offered under the notice or under the declaration. For if offered in either way the objections apply.

These views are sufficient to show that the court erred, in giving the charge to the jury as well as in admitting the proof.

It requires neither authority or arguments to show that the court erred in admitting the proof as to the custom.

But it may be said that although the note is void, yet under the common count they have a right to recover for money lent. This can not be sustained, because the proof shows that A. B. Murrah did not in fact borrow or receive from the Bank one dollar. And unless he did receive the money, the Bank can not recover under the common count. Life and Fire Insurance Company v. Mechanics Fire Insurance Company of New York, 7 Wend. 31.

Cooper, Brickell and Jones, for the defendant.

1. It is conceded, that a contract to pay the debt of another, must be in writing, and for a valid consideration. The note in this case removes all controversy about the writing. If it did not, the promise could be sustained as an original promise, on the consideration disclosed, the debt of Murrah & Gamble having been paid by this note. Leonard v. Vredenberg, 8 Johns. 30; Anderson v. Davis, 9 Vermont, 136.

2. As to the consideration, any injury or detriment to the party to whom the promise is made, or any benefit to the party promising, is a sufficient consideration to support a contract. Foster v. Fuller, 6 Mass. 59; Overstreet v. Phillips, 1 Littell, 121; Rundle v. Harris, 6 Yerger, 508. The taking of this note by the Bank, in payment, and consequently, in discharge of the original debt of Murrah & Gamble, was such an injury or detriment to the Bank, as would constitute a valid consideration. Leonard v. Vredenburg, and Anderson v. Davis, cited above.

Was the parol evidence as to the consideration of this contract, admissible under the language of this note? The indebtedness spoken of is a *present*, not a *past* indebtedness, just such an indebtedness as was imposed on the plaintiff in error, by his assumption of, and the Bank's discharge of the debt of Murrah & Gamble. There is, then, no conflict between the writing and the parol evidence. The terms used may have been applied to an indebtedness previously existing, or to an indebtedness that moment created. Where the terms of a written instrument are equivocal, or apply indifferently to more than one subject-matter, parol evidence is admissible to point out the true subject matter. 1 Greenl. on Evidence 524; 1 Barbour 525; 3 Johns. 319; 1 Paige 272;

4 Barn. & Adol. 787; 7 Carr. & Payne 761; 5 Pick. 35; 2 Ala. 284; 2 Leigh 256; Cowen & Hill's Notes (Part 2) 1590. Again, parol evidence is admissible to show a consideration not mentioned in a deed, or writing, or a further consideration, if not inconsistent or incompatible with that mentioned. 5 Stew. & Port. 420.

But it is said, that the language of the note adopts the provisions of the statute recited, and requires proof of an indebtedness existing at the time of its passage. We reply, that such was the debt of Murrah & Gamble, for which this note was taken. The statute only intended to require a division, an extension, of the debts due the Bank, and this was one. It does not grant indulgence to one man in preference to another, but simply requires the Bank to extend the time of the payment of the debts due it. This power the Bank had before the passage of the Act. The Bank could at any time have compounded, released, or extended the time of the payment of any debt due it. Or, if the Bank found it necessary for the security of any debt, or for any other reason which it might deem sufficient, it had the right, the power, to substitute the note of one person for that of another. The power to deal in bills of exchange, to discount notes, &c., included within it the right of doing everything that may be necessary to collect such notes as may be discounted, or such bills of exchange as may be purchased. Without this right, the power of discounting, &c., would be an injury instead of a benefit.

But we contend, that this note was taken under the Act of 1837, and that it was perfectly competent for the Bank so to do. The consideration for which the note was given was a debt which could be extended under the Act of 1837. The privilege of extension is an incident to the debt, and why it should not pass to any person willing to assume the indebtedness we cannot see. The person assuming the indebtedness secures either for himself, or the debtor, the benefit which the statute intended to confer by an extension of the debt, and the Bank sustains all the injury that it could sustain, if the debt had been extended by the debtor. The time of payment is extended, thus relieving the debtor from being forced by suit to make immediate payment. The Bank is forced to wait,

until each instalment falls due, before it can collect its debts. And we insist, that the Bank had this right, as there is nothing in the statute inhibiting it, and that the Bank had the right under its charter to extend the debts due it.

But it is insisted, that the note is void, because more than six per cent. interest is reserved by it to the Bank. To this we reply, that this was not a discount, such as is contemplated by the section of the charter inhibiting the Bank from taking more than six per cent. This was an extension under the Act of 1837 of a debt, upon which, when extended, the Bank had the right to charge eight per cent. interest. Clay's Digest 112, § 51.

But again, if we are wrong in the positions stated above, the contract is nevertheless obligatory. The act in question and other kindred statutes are directory, intended not as restrictions upon the powers of the Bank, but as guides to its officers. The Bank officers may have transcended their duties, not their powers, but this cannot furnish any defence to those, who through this means, have possessed themselves of the Bank property. 2 Ala. Rep. 462.

The evidence admitted was objected to as a whole. Now, if any portion of the testimony was admissible, this court will not reverse, though another portion may have been inadmissible. For it was not the duty of the court below to discriminate, separating the admissible from the inadmissible part. It is also a rule, that when a party excepts to the admission of testimony, he must set out in his bill of exceptions the testimony admitted, or the Appellate Court will not interpose. Cowen & Hill's Notes 792. The check introduced, and referred to in the bill of exceptions, is not set out. How can this court say that the check was inadmissible? If it was admissible, the court below did not err. Must not this court presume that the check was inadmissible before the judgment of the court below can be reversed?

GOLDTHWAITE, J.—The record in this case shows a bill of exceptions signed and sealed in term time. There are also additional exceptions, which appear to have been taken on the trial of the same cause, but which are entirely disconnected from the first bill of exceptions, are without date, and

with nothing on their face to indicate at what time they were signed. The case of Kitchens v. Moye, 17 Ala. Rep. 143, is conclusive to the point, that the record must show affirmatively, that the bill of exceptions was signed before the adjournment of court, or within ten days thereafter, by the written consent of the counsel engaged in the cause. On the authority of the case cited, the exceptions objected to cannot be considered as any part of the record, and the motion of the defendant in error to strike them off must prevail.

The remaining question is, whether the court below erred in allowing the evidence set out in the first bill of exceptions, to go to the jury; and this, in our opinion presents simply the inquiry as to the effect of a third person giving his note in consideration of the extinguishment of the debt of another. The evidence admitted, shows that Gamble & Murrah were indebted to the Branch Bank at Decatur, and it also tends to show that the note, on which the proceedings in the court below were instituted, was given by the plaintiff in error for the purpose of extinguishing this debt, and that in reality it was applied to that object. The check which was proved to have been signed by the plaintiff in error, but which is not set out in the record, on account of its loss, it is fair to presume, directed the proceeds of the note to be passed to the credit of Murrah & Gamble, or to be applied to the debt owing by them. This was in all respects a perfectly legitimate transaction, and by it, as expressed in the face of the note, the plaintiff in error was indebted to the defendant in error, and the evidence offered, instead of contradicting the specific consideration stated in the note, tends to confirm it. It is unnecessary to inquire into the admissibility of the other portions of the evidence, as the objection was taken to the testimony as a whole, and under the repeated decisions of this court, unless all the evidence offered was inadmissible, the court was not bound to exclude any part. Litchfield v. Falconer, 2 Ala. Rep. 280; Hatchett v. Gibson, 13 Ala. Rep. 587; Melton v. Troutman, 15 Ala. Rep. 535.

In relation to the question attempted to be raised, as to the Bank exceeding its power, by the taking of more than six per cent. interest on the note, we are satisfied that it cannot, on the record as it now stands, be presented in this court. It

could have been made in the court below, either by a demurrer to the evidence, or by requesting the necessary instruction to the jury; but is certainly not involved in the consideration of the admissibility of the evidence, as disclosed by the bill of exceptions.

Let the judgment be affirmed.

RICE, EX'R, *vs.* DILLAHUNTY.

1. A petition for a *supersedeas* which alleges that the judgment "is satisfied," on which the execution issued which the party seeks to quash, is sufficient in law on demurrer.

ERROR to the Circuit Court of Lauderdale.

Tried before the Hon. Thomas A. Walker.

The plaintiff in error, as executor of Andrews, filed his petition for a *supersedeas*, to quash an execution. The petition alleges, that a judgment was rendered against said Andrews and one Kirkman, on the 8th October, 1847, in favor of Dillahunty, the defendant in error; that a writ of *fi. fa.* issued on this judgment on the 26th October, 1847; that Andrews died on the 18th January, 1848; and that an *alias fi. fa.* was issued on the judgment on the 21st October, 1848. It further averred that the judgment was "*satisfied*," and that the plaintiff in execution himself had entered on the execution docket, opposite the case, in his own handwriting, this memorandum: "This judgment is satisfied as per agreement between the parties, 21st October, 1847," signed, "Henry Dillahunty." The petition also alleged that the costs which were taxed and charged in the execution, were more than was legal and proper.

The petitioner prayed that the *fi. fa.* should be quashed, and satisfaction of the judgment be entered; or, if he should fail to make these averments good, that then the costs allowed to the witnesses should be re-taxed. This petition was taken as a declaration, by consent of parties. There were three

pleas, to the first two of which the plaintiff demurred, and on the third he joined issue. In considering the demurrer, the court held that the plaintiff's petition came under revision, and that the same was not sufficient in law to entitle him to his motion. Judgment was accordingly given for the defendant, dismissing the *supersedeas* with costs, and this judgment is now assigned for error.

WILLIAM COOPER, for plaintiff in error.

No counsel for defendant.

PHELAN, J.—The question presented for decision is, the sufficiency of the petition for a *supersedeas*, and the facts therein stated, to entitle the plaintiff, if true, to his motion to quash, or to enter satisfaction. The petition, by agreement, stood in the place of a declaration. The demurrer of the plaintiff to the defendant's plea, when it is visited at the instance of the defendant on the declaration, has the effect of every other demurrer; the defendant thereby admits the declaration to be true. In this way, by the pleadings, the facts stated in the petition are admitted to be true.

What are those facts? Besides some other facts which are stated, in reference to the issuance of the original *fi. fa.* and the death of plaintiff's testator subsequently, and then the issuance of an *alias fi. fa.* which we need not more particularly consider, it is averred, in very plain and direct terms, that the judgment on which the execution issued "is satisfied." Here is an averment which, if supported by proof, will clearly entitle the plaintiff to his motion to quash the execution, and also to his motion to have satisfaction entered. Lockhart v. McElroy, 4 Ala. 572. But the demurrer admits the averment to be true. It follows necessarily that the Circuit Court erred, in declaring the petition to be insufficient in law to entitle the plaintiff to his motion, and in dismissing the *supersedeas*.

For this error, let the judgment of the court below be reversed, and the cause remanded.

BLACK'S CREDITORS *vs.* BLACK'S ADM'RS.

1. A writ of error does not lie to reverse a decree of insolvency until a final decree of settlement has been rendered, unless an issue has been made up and tried under the act of 1843.
2. If an issue is made up and tried, under the act of 1843, a writ of error can only be sued out within a year from the trial of such issue.

ERROR to the Court of Probate of Marshall.
Motion to dismiss the Writ of Error.

L. WYETH, for the motion.
J. W. SHEPHERD, *contra.*

DARGAN, C. J.—On the second Monday in August, A. D. 1848, the estate of William Black, deceased, was declared insolvent by the Orphans' Court of Marshall, but without any contest on the part of the creditors. On the eleventh day of August, 1851, such of the creditors as had filed their claims in the office of the Court of Probate, joined in a writ of error to this court, for the purpose of reversing the decree of insolvency, and a motion is now made to dismiss the writ of error. Previous to the act of 1843, the mere report of an executor, or an administrator, that the estate he represented was insolvent, was sufficient to authorize the Orphans' Court (as it was then called) to take jurisdiction of the estate as an insolvent estate, and to administer it as such; and the creditors could not prosecute a writ of error to revise any act of the court, until a final decree settling the estate was rendered. But by the act of 1843, the creditors have the right to come in and contest the fact of insolvency, and to make an issue of fact, which shall be tried by a jury. This act also allows other issues to be made up and tried in the progress of the cause, before the final settlement is complete. By the thirteenth section of this act, it is provided that, on the trial of any issue directed to be made up and tried under the provisions of said act, if either party shall be dissatisfied with any decision or charge of the judge trying the same, such party may except to such decision or charge, and tender his bill of exceptions, as in trials of suits at common law, and

may within twelve months thereafter, appeal from or sue out a writ of error to such judgment, as in suits at common law. It is apparent that a writ of error is given by this statute, only when an issue has been made up and tried according to its provisions, and then the writ must be sued out within a year from the time of the trial of such issue; it cannot be issued afterwards. But if no issue has been made up and tried under this act, then no writ of error can be issued under its authority, for the writ is only given when an issue has been tried. The writ of error must then be sustained under other authority than this act, for in the case before us, it was not issued within a year from the rendition of the decree, nor was any issue made up and tried. But independent of this act, no writ of error can be issued until the final decree of settlement; for anterior to its passage, a writ of error would not lie to review the proceedings of the Orphans' Court, had in reference to an insolvent estate, until the final decree by which the assets were distributed amongst the creditors, and such is still the case, unless the writ can be issued pursuant to the provisions of this act. I will not say whether the writ could have issued to review the decree of insolvency, before the final decree distributing the assets, if the act of 1843 had made no provision for the writ of error. But inasmuch as it has, it is clear to my mind that the Legislature intended that the writ of error should only issue, during the progress of the cause in the Orphans' Court, in the mode pointed out in the act. We, therefore, must dismiss the writ on two grounds; first, it cannot be issued before the final decree of settlement is rendered, unless an issue has been made up and tried; secondly, it then can issue only within a year from the time such issue has been tried.

Writ of error dismissed.

EDY *vs.* McCOY.

1. In assumpsit to recover from defendant for the board of an orphan minor, who had no guardian, the plaintiff showed such a state of facts as tended to prove that defendant had placed himself *in loco parentis* to her. *Held,*
That to rebut this presumption, and to show the manner in which he had received the child into his house, and his motive in receiving her, and afterwards carrying her to plaintiff's, the defendant might prove declarations made by the child at the time she came to his house.

ERROR to the Circuit Court of Chambers.

Tried before the Hon. Robert Dougherty.

This was on action of assumpsit, brought by the plaintiff to recover of the defendant for the board of a minor by the name of Amanda Phipps. It appeared that the father and mother of the child were both dead, and that they left five small children; three of whom were taken by the plaintiff to be raised, and Amanda was taken by Mr. Dozier. The girl left the house of Dozier and came to the defendant's, and remained there for several days. The defendant being about to go to Tuskegee, and having to pass near the residence of the plaintiff, she requested to go with him to see her brothers and sisters. The defendant at first objected, but finally consented and took her with him; when they came near the plaintiff's residence, he pointed out the house to her, and she went to it. Some time afterwards the plaintiff requested the defendant to take her away, and said that if he did not he would charge him with her board; but this was not done, and the girl still remains at the house of the plaintiff. It also appeared that Amanda had no guardian. The defendant introduced a witness, who stated that the child said, when she first came from Dozier's to the house of the defendant, that she was not well treated at Dozier's, and that she wanted to stay at the defendant's until he could send her to the plaintiff's. To this testimony offered by the defendant, the plaintiff objected, but his objection was overruled.

RICE, for plaintiff.
FALKNER, *contra.*

CHILTON, J.—The question involved in the issue to be tried by the jury in the court below was, whether the facts of the case showed that McCoy was liable to Edy for the board of the child Amanda. How was this to be shown? Edy attempted to establish his liability, by showing that he had brought the child to his house, and thus laid the predicate for a presumption that McCoy had assumed a *quasi* guardianship for the child, and had by his acts with reference to her, placed himself *in loco parentis.* It was certainly competent for McCoy to rebut this proof. Suppose he had, on his way to Tuskegee, found the child walking in the road, and she had requested a seat in his carriage to ride as far as Edy's, and from motives of kindness he had granted her request, it is too plain for argument that her declarations which prompted him to receive her into his carriage, and which consequently explain the act, would have been good evidence as constituting part of the *res gestae.* We entertain no doubt, and all the authorities are agreed, that even the declarations of McCoy himself, accompanying the act of receiving her, and explanatory of that act, would have been legitimate proof. This is a plain elementary principle of the law. Now how is the principle altered, when instead of meeting the child by the way-side, she comes to his house, and prays admittance until he could send her to Edy's where her brothers and sisters resided, urging as a reason why he should do this, her ill-treatment at Dozier's. The question immediately springs up, when Edy proved the child was in the care of McCoy, what relation did he sustain to her? Did he receive her under his roof to support her, or did he, as an act of benevolence merely, receive her temporarily to send her elsewhere? The manner in which he took charge of her, is the main fact to be proved, as upon that depended his liability for her board, and all the circumstances connected with her being received under the protection of McCoy, explanatory of such reception, are clearly legitimate proof. The proof clearly tended to show, that McCoy received the child for the purpose of taking her to her relation's house, and was influenced by motives of benevolence, and not for the purpose of keeping her as a permanent member of his family; and thus tended to explain the act, not only as to how he received her, but the reasons for

taking her to the house of Edy, namely, that he merely received her for that purpose, being induced to do so from feelings of benevolence, excited by the declarations of the child of mistreatment at Mr. Dozier's.

We think it quite clear, that the court committed no error in admitting the proof.

Judgment of affirmance.

BARNEY *vs.* EARLE, EXEC'R. &C.

1. A partner who executes a note in the name of the partnership, is not a competent witness against his co-partner, when the latter is sued alone on the note.
2. When an agent, acting within the scope of his authority, executes a promissory note in the name of his principal and himself, he is an incompetent witness against his principal, when the latter is sued alone on the note.
3. When an agent, having authority from his principal to purchase goods from A. purchases from B., and executes a note in the name of his principal and himself jointly, for the purchase money, he is an incompetent witness against his principal, when the latter is sued on the note.

ERROR to the Circuit Court of Marengo.

Tried before the Hon. George Goldthwaite.

Assumpsit by the defendant in error. The declaration contained two counts, the first on a lost promissory note, and the second, *indebitatus assumpsit.* There was a demurrer to the first count, which was sustained by the court below, and the parties went to trial on the second.

On that trial the plaintiff offered Henry A. Skinner as a witness, who being objected to by the defendant, on the score of interest in the result of the suit, was examined on his *voire dire.* When thus examined he stated, "that at the time of the purchase of the corn sued for, the defendant Barney and himself were partners in planting; that witness was authorized by him to purchase the corn, which he did, and gave a note therefor, signed Barney & Skinner, by H. A. Skinner; that the corn so purchased was for the individual benefit of Barney, who has since promised to pay for the same, and that

there has been a final settlement of the partnership accounts between witness and defendant." The defendant then objected to the witness being sworn in chief, or allowed to testify, because, by his own showing, he was interested in behalf of the plaintiff. The court overruled the objection, and the defendant excepted.

In his testimony the witness stated, that at the request of Barney he purchased corn of Joseph B. Earle, which was represented to belong to James W. Earle, to be paid for in sixty days; that in consequence of a matter between Jos. B. Earle and himself, he gave Earle a note for the corn, negotiable in bank, at sixty days, signed Barney & Skinner, by H. A. Skinner; that he had no authority from Barney to give the note, other than that to purchase the corn; that the corn was used on Barney's plantation; that he (Barney) ratified the purchase after it was made, and agreed to pay for the corn; that Earle passed the note to one Bondurant, under an agreement that if Barney paid the money on it, Bondurant should pass the sum so paid to Earle's credit with him; that Bondurant called on Barney and demanded payment, but does not know whether it was before or after the loss of the note; Barney, at first, refused to pay Bondurant, but after seeing witness, said, in Bondurant's presence, that he would pay the debt, but witness could not say whether he meant the note, or an account for the corn; that Barney, after the note spoken of was given, acknowledged that he had denied the authority of witness to make it, but said he would pay for the corn; when cross-examined by defendant, that Barney instructed him to buy the corn of Joseph B. and not James W. Earle, but he afterwards informed Barney that the corn purchased was the property of James W. Earle, and Barney agreed to pay for it.

The defendant below demurred to the evidence, and the court gave judgment for the plaintiff, to review which the case is brought to this court.

Brooks & Byrd, for plaintiff in error:

1. A partner is not a competent witness for the plaintiff in a suit against his co-partner alone, on a partnership debt. Lewis v. Post & Main, 1 Ala. 72; Bean v. Pearsall, 12 ib. 592.

2. An agent, who signs his principal's name to a note, and his own as surety, is not a competent witness for the plaintiff in a suit against the principal alone. Scott v. Yarbrough, 5 Ala. 221; McCall v. Sinclair, 14 ib. 764; Phil. on Ev. (C. & H.'s Notes,) 112, 266.

A. R. MANNING, *contra.*

LIGON, J.—The only question for our determination is, did the court below err, in allowing the witness Skinner to testify for the plaintiff?

To ascertain this, it will be necessary for us to examine the rights and liabilities of the parties in this transaction, as they are shown in the examination of the witness on his *voire dire*, and in his testimony in chief.

First. It appears from these, that Barney and the witness were partners, and for the purchase of goods necessary for, and properly appertaining to, the business of the partnership, the witness makes a negotiable note, in the name of the firm, to a third person. This view of the case places the witness in as favorable a position as he can possibly occupy under the proof. What are the rights and liabilities of the parties? The payee, or holder of the note, has the right to enforce its collection against both the partners; and if one of them should respond to his judgment, by paying it in full out of his own means, his co-parner would be liable to him for contribution only. If one partner only were sued by the payee or holder, (which is the case here,) and the plaintiff were to recover the whole amount against him, the co-partner, who in the first instance was liable for the entire debt, is released from that liability, and becomes responsible to his co-partner for only one half this sum. It is, then, clearly and directly the interest of the partner not sued, to aid the plaintiff in his recovery against his co-partner. This was the situation of the witness Skinner, and we think he should not have been allowed to testify.

In Lewis v. Post & Main, 1 Ala. 65, this point arose, and this court then held the partner who was offered as a witness incompetent, on account of direct interest, in the legal sense of that term, and proceeded to say, "If the judgment which is obtained on the evidence of a partner will inure to his benefit

when collected, by discharging him from the payment of a portion of a sum of which he might otherwise be compelled to pay the whole, it cannot be said that he has no interest in the suit, or that it is uncertain, doubtful, or contingent, in the legal sense of these words. Whenever, by operation of a judgment at law, without the act of a party, a debt or right of action will be extinguished or lessened, we must consider the extinguishment, whether in whole or in part, as the necessary result of the verdict, and a witness who is interested to produce such a result, is, by the general rules of evidence, incompetent without a release." The ruling in the case cited is decisive of this, in the aspect in which we are now considering it, has been followed in later cases, and we are not disposed to disturb it.

Second. Should it be contended, that when all the statements of Skinner, the witness, are taken together, they show that he acted only as the agent of Barney, acting within the scope of his authority, in purchasing the corn and making the note, and that the firm of Barney & Skinner, as such, were in no wise bound for the payment, then the case amounts to this: that the agent subscribed his own name to the note of his principal as security for the latter. Does this render him disinterested, in a suit between the payee or holder of the note and his principal? By no means. As a joint and several maker of the note, he is liable to the payee or holder for the full amount of the debt; but if his principal be sued alone, and the agent, by his testimony, procures a judgment against such principal, and it is satisfied, the agent, as surety, is forever discharged from all liability for the debt, or any portion of it. The reason for his exclusion is stronger on this view of the case, than it was on the first, and the rule laid down in the case of McCall v. Sinclair, 14 Ala. 764, fully sustains us in this conclusion.

Third. Let us examine the case in another aspect, which is fully justified by the record. Skinner says, that although authorized by Barney to purchase the corn of *Joseph B.* Earle, he had no express authority to make any note for the purchase money. He says, also, that the corn purchased belonged to *James W.* Earle, and not *Joseph B.*, and although he does not distinctly state that the note given was payable

to Jas. W. Earle, yet the record comes to his aid, and shows that Jas. W. Earle was the payee; for the writ and declaration are in his name, and founded on a note payable to himself. We apprehend it will scarcely be contended, that authority given to an agent to purchase an article of A., would give the agent power to buy it of B., for the principal has a right to select his creditor, and when this selection is made, and the agent directed to purchase of him, such agent has no power to make his principal liable to another, even though the liability be for the same articles he had been directed to purchase. This being the law, Skinner stands, in this transaction, in the attitude of an agent who has exceeded his authority, and without power to bind his principal. The note made by him to *James W.* Earle was, as he confesses, made without authority, nor does it anywhere appear that Barney subsequently ratified it. This being the case, the note is void as to Barney, but good and available in the hands of the holder against Skinner himself. He is, then, directly interested in fixing Barney's liability.

In every view we have been able to take of this case, the witness Skinner is incompetent, and should not have been permitted to testify.

Let the judgment be reversed, and the cause remanded.

LIGHTSEY *vs.* HARRIS.

1. A judgment rendered by a justice of the peace cannot be impeached, in a collateral proceeding, by proof that the warrant was not served on one of the defendants.
2. A judgment rendered by a justice of the peace, "for thirty-seven dollars and thirty cents, on note due 25th December, 1840, bearing interest from that date, and cost of suit," though informal, is not void for uncertainty. It is, in legal effect, a judgment for $37 30.

ERROR to the Circuit Court of Bibb.

Tried before the Hon. Geo. D. Shortridge.

This was an action of trespass by Harris against Lightsey,

"brought to recover damages of the defendant, for suing out a void execution, before one Anderson B. Davis, an acting justice of the peace in and for Perry county, and causing the same to be levied by one Leroy Davis, a constable in and for said county, on the cotton of plaintiff, and causing said cotton to be sold by said constable, under said void execution." The defendant pleaded "not guilty, and justification under legal process." It appears from the bill of exceptions, that a judgment was rendered by a justice of the peace, which on its face, purported to have been rendered on the 6th March, 1841, in favor of said Lightsey against said Harris and one Bagwell, "for thirty-seven dollars and thirty cents, on note due 25th December, 1840, bearing interest from that date, and costs of suit;" and on this judgment an execution was issued and levied on plaintiff's property. The court permitted the plaintiff to prove, against the objection of the defendant, that the warrant was not in fact served on him, but only on Bagwell. The court also ruled, on this evidence, that if there was no service of the warrant on the plaintiff, and no evidence that he appeared, the judgment was void as to him. There was a verdict for the plaintiff. The admission of the evidence, and the ruling of the court, are now assigned for error.

McIlvain, for plaintiff in error.
A. B. Moore, for defendant in error.

GOLDTHWAITE, J.—Upon the evidence as stated in the bill of exceptions, it does not appear whether the warrant was returned executed or not, but from the language used, we understand the admission of the evidence objected to, to go to the extent, that a judgment rendered by a justice of the peace may be impeached collaterally, by proof that service of the warrant was not made, without reference to its execution as indicated by the return of the constable; and we understand also the ruling of the court upon evidence of this character to assert the broad proposition, that if *in fact* the warrant was not executed, and there was no evidence that the defendant appeared, the proceedings are *coram non judice*, and the judgment void. If the ruling of the court below was correct, it follows necessarily, that whenever a judgment is rendered by a justice of the peace, the return of the officer as

to the service of the warrant can be impeached in a collateral proceeding, and that the party attempting to enforce the judgment would be guilty as a trespasser.

It was decided by this court in Crafts v. Dexter, 8 Ala. Rep. 767, that a defendant against whom a judgment has been rendered, may have relief in chancery, upon an allegation that he has a legal defence, and that the writ, although returned executed by the sheriff, had never been served upon him, and Ormond, J. in delivering the opinion of the court, says: "It is certainly the general rule, that the court gives credence to the acts of its own officers, and will not permit their truth to be disputed; otherwise the court would be impeded at every step in its progress, by the trial of collateral issues of fact;" and in Brown v. Turner, 11 Ala. Rep. 758, a plea that the writ was not served as returned by the sheriff was held bad, upon the principle of the former case. It is to be observed, that in the cases cited, the rule adopted is not founded on the character of the court, but upon principles applicable to all courts, whether of general or special jurisdiction, of record or not of record. These decisions are conclusive of the question presented in this case. Under their influence, if the warrant against the plaintiff in error had been returned executed, he would not have been permitted on the trial before the magistrate to show the want of service, but would have been turned over to his remedy against the officer, or remitted to another tribunal. The ruling of the court would authorize him to do collaterally, that which he could not do in the direct proceeding against him.

It is, however, urged, that the record shows that the judgment under which the defendant in error justified, was void for uncertainty, and that such being the case, this court will not revise the reasons upon which the court below made the decision, the decision being correct in law. The judgment purports on its face to have been rendered in favor of the defendant in error for the use of another, against the plaintiff in error and Bagwell, for thirty-seven dollars and thirty cents, on a note due the 25th December, 1840, bearing interest from that date, and costs of suit. The judgment, perhaps, is not as formal as it should be, but it is not uncertain. It is, in legal effect, a judgment for thirty-seven dollars and

thirty cents, the words "bearing interest from date," referring to the note, and not to the judgment.

The judgment is reversed, and the cause remanded.

RIDDLE *vs.* BROWN, ET AL.

1. The "right to dig and carry away ore," from the mine of another, is an incorporeal hereditament, or easement; and any contract for the sale of such a right, to be binding in law, under the statute of frauds, must be in writing.
2. A verbal contract, conferring such a right, though not binding under the statute of frauds, will nevertheless operate as a verbal license, and, while unrevoked, will protect the person to whom it was given, from *trespass quare clausum fregit*, for digging ore, and vest in him the property in the ore that is actually dug under it.
3. But such a verbal license is revocable, at the pleasure of the party by whom it is given; it is, moreover, personal, and not assignable.
4. Such a verbal license, given by A. to B., and by B. afterwards transferred to C., will not justify C. in entering by force the enclosure of A., in which the bank or mine of ore is situated, A. being at the time the owner of the freehold, and warning C. not to attempt to enter. C. in such a case, becomes himself a trespasser, and he may be repelled by A., with all the force necessary to protect his possession.
5. When it becomes a material question, whether more personal injury was inflicted by the defendant on the plaintiff, than was necessary to protect the possession of the former against the attempt of the latter to enter his close, it is competent for the defendant to give in evidence conversations of the plaintiff held some time previous to the beating, though not communicated to the defendant until afterwards, showing an angry state of feeling between the parties, concerning their respective claims to the possession of the close.

ERROR to the Circuit Court of Talladega.
Tried before the Hon. E. Pickens.

THIS was an action of TRESPASS *vi et armis*, brought by the plaintiff in error against the defendants, for injuries to the person.

The defendants pleaded the general issue, with leave to give any special matter in bar, in evidence.

The record exhibits the following state of facts: The difficulty arose in regard to the right of the plaintiff in error, as one of the firm of W. D. Riddle & Co., to enter on a certain

tract of land with his wagon, to haul from thence a quantity of iron ore, which had been previously dug from an ore bank situate on said tract, by persons in his employ. This right was resisted by the defendants in error.

The right claimed by the plaintiff in error rested upon the following state of facts: One John M. Moore, who was in 1841 or '42, the owner of iron works in Talladega, entered into *a verbal* agreement with John F. Atkinson, one of the defendants, who acted at the time by the permission of his father, Stephen Atkinson, then the owner of the land on which the ore bank was situated, which is thus described in the bill of exceptions: "he (Moore) contracted with him (John F. Atkinson), for the right to dig and carry away ore from this bank, for 1000 pounds of iron, to be delivered from time to time, as he wanted it." Moore continued to get ore under this contract, until March, 1843, when he sold out his iron works to Walter D. Riddle, the brother and copartner of plaintiff. The defendant, John F. Atkinson, sent, from time to time, to Moore, under this contract, for iron, and got it, until he sold out to Riddle. When Moore sold out to Riddle, he "let Riddle have the ore bank on the same terms that he had it," and made him a deed for it. The ore bank was in the woods, unenclosed at the time of this contract. It was afterwards enclosed by Stephen Atkinson, but a gate was erected, for Moore to pass in and out after ore with his wagons. Riddle went on getting ore for a considerable time after the sale by Moore to him.

It was in proof, that the ore bank was, at the time of the difficulty, in an enclosure, in which there was growing a crop, cultivated and belonging to the defendants; and the title to the land was in the defendant, John F. Atkinson, devised to him by the will of his father, Stephen Atkinson.

It was further proved, that the said John F., the day before the difficulty, warned and forbid the wagoner of plaintiff not to pull down his fence or enter his enclosure any more to get ore.

On the day of the difficulty, the three defendants had stationed themselves near the gap, where the wagon of plaintiff commonly entered, in going to the ore bank. They all had newly cut sticks. The plaintiff, in company with another

person, rode up, and a conversation arose, in which defendant, John F., declared that the wagon of plaintiff, which was then expected, should not enter the enclosure. The plaintiff, in a mild manner, expostulated with plaintiff, and told him that he did not want to settle rights by force, but insisted that he had purchased the ore bank, was in possession, and would go in. Defendant, Atkinson, on his part insisted, that the possession was in him, and that plaintiff had no right to go in, and warned plaintiff not to take down the fence. Plaintiff then ordered his wagoner to take down the fence. Brown, at this, raised his stick, saying, "you had better not." Riddle then laid his hand on a rail of the fence, and at this juncture, he was struck by John F. Atkinson, with his stick, and a fight ensued, between the three defendants, on one side, and Riddle, his companion and the wagoner, on the other, all bearing some part, in which the defendants inflicted serious personal injury with their sticks on Riddle. Riddle also had a stick at the time, but it was his usual walking stick.

In the course of the trial, a witness testified, that plaintiff had said, some time previous to this difficulty, "that Brown and Atkinson (the defendants) were endeavoring to prevent him from getting ore from this bank, by threatening to beat him, but they could not do it; the ore bank was his, and he had possession of it; that, as to John F. Atkinson, he did not mind him any more than he would a negro; that he could or would take a cowhide to him, if he interfered with him, and run him off the place." On cross examination, the witness said he did not tell this to defendants until long after the fight occurred. Upon this, plaintiff moved to exclude the testimony, which the court refused, and plaintiff excepted.

It appeared, that defendant, John F. Atkinson, was fully apprized of the sale of the right to get ore, from Moore to the Riddles; and that ore was procured by them at this bank for a considerable time thereafter.

The court charged the jury:

1. That if it appeared that Moore had obtained a verbal license from Stephen Atkinson, or John F., in 1842, in consideration of one thousand pounds of iron, to be delivered from time to time, as he wanted it, to dig and carry away ore

from said bank, and that plaintiff had no other right to dig and carry away said ore, except what he had derived from Moore in his contract with said Moore (the charge in the record says here, "*verbal* contract"), then the contract was void, and plaintiff had no right to enter said enclosure for the purpose of hauling off the ore that had been dug ready for removal, if defendants were at the usual place of entrance, and forbid plaintiff from entering.

2. That if Moore purchased the right to dig and remove ore, as shown in the evidence, and it was a verbal agreement, then it was in the nature of a personal license, and that neither W. D. Riddle, nor plaintiff, as his co-partner, had any right to enter, dig and carry away ore under it. To these charges plaintiff excepted, and requested the court to charge:

1. That if the jury believed, from the evidence, that Moore purchased of defendant John F., by the direction of his father, Stephen Atkinson, in 1841 or '42, the right to dig and carry away the ore from this bank, for and in consideration of one thousand pounds of iron, to be delivered to him from time to time, as he wanted it; and that he went into possession of said ore bank under said contract, and continued to haul ore until he sold to Wm. D. Riddle, in March, 1843, and that he then let him have the right, on the terms he had it; and that defendant John F. knew of it, and that Riddle and plaintiff, as co-partner and agent, have continued in possession ever since, up to the day when the difficulty occurred; then the plaintiff had, under such possession, such a right of entrance as entitled him to go in and out, without forcible interruption or molestation from defendants; and that if defendants, while his team was gone with a load of ore, went to the usual place of entrance, and when plaintiff returned and attempted peaceably to enter, as aforetime, used force to prevent him, and the beating proved was then given, they must find for the plaintiff. This charge the court refused.

The admission of the evidence objected to, as aforesaid, and the charges given, and the refusal to charge, as aforesaid, are severally assigned as error.

White & Parsons, for plaintiff in error.

1. The facts in evidence, at the time the will was offered,

shew that Riddle was in possession of the ore bank, claiming under deed from Moore. This constitutes color of title, and makes him something more than a trespasser. Therefore we insist that any conveyance of the premises, thus held adversely, passed no right or title to them. A deed would certainly be inoperative under this state of facts. What difference is there in favor of a will?

2. The third exception in the record is certainly well taken. What fact material to the issue does the evidence objected to tend to establish? It certainly did not influence the conduct of the defendants at the time of the fight, for they did not know it at that time, nor until "long after the fight occurred." For the same reason, it was inadmissible in mitigation of damages.

3. The first charge must be tested by the evidence, which is all set out in the record. The court puts the case, in this charge, upon the ground that plaintiff had no other contract with Moore than a "verbal" one, when Moore proves that at the time he sold out to him "he made a deed to Riddle for it." This charge therefore is abstract, and based upon a view of the case wholly unwarranted by the evidence, and well calculated to mislead the jury.

4. The charge asked by plaintiff should have been given, because plaintiff was in peaceable possession of the ore bank, under color of title, and had been for several years; and the law does not authorize the use of force to put an end to such a possession as this.

Rice & Morgan, *contra.*

1. The will was offered to show title in the defendant, and was offered in connection with proof of title in Stephen Atkinson, the father of John Atkinson. The title was the most material question in the case, as it brought up the question as to whether the defendants could justify an act to defend the possession of the land. (See cases cited in the paragraph numbered 3, below.)

2. The next question is, upon the competency of the proof of the previous declarations of Riddle, not communicated to the defendants until after the fight. Where a party in a civil suit is asking damages for a tresspass, the question

always arises, whether he had any improper agency in bringing the difficulty upon himself. The declarations were clearly admissible to show that plaintiff knew the license was countermanded. And in such cases as this, the question is very material whether too much force (an excess of force) was used by the alleged trespasser in defending his possession. And we all know that less force would be necessary to defend against a less determined man, than against one whose purpose of invading the possession of another is fixed and intensified, by an admitted contempt and hatred to the other. Newton v. Holford, 47 Eng. Com. Law Rep. 537.

3. The real merits of the case and the law are with the defendants. Cook v. Stearns, 11 Mass. Rep. 533; Thompson v. Gregory, 4 Johns. Rep. 81; Emerson v. Fisk, 6 Greenl. Rep. 200; 2 U. S. Dig. 788 §§ 4 and 5.

4. The foregoing authorities prove that the verbal license to Moore was not assignable; that it was merely personal.

PHELAN, J.—It becomes necessary, in this case, to ascertain with some precision, the first place, what interest or estate passed to Moore by the agreement entered into between him and defendant, John F. Atkinson, by which the former was to have "the right to dig and carry away ore from the bank" in consideration of "one thousand pounds of iron to be paid to the latter from time to time as he wanted it."

Mines are a part of the freehold, and *prima facie* the owner of the freehold has a right to the mines and minerals underneath; but this is only a presumption of law, that may be rebutted, by showing a distinct title to the surface in one, and to that which is underneath in another, for mines may form a distinct possession and different inheritances from the surface. 1 Crabb R. P. 93.

Again: There may be a right to dig ore in the mines of another, as distinct from the ownership of the mines, as that may be from the ownership of the surface. This right to dig ore in the mines of another, if it be to one and his heirs, is an incorporeal hereditament. Grubb v. Guilford, 6 Watts. It is a permanent interest in the land of another, to which a legal title can only pass by deed, and of which no sale can be made, which is binding, unless reduced to writing, agreeably

to the statute of frauds. 1 Gill & Johnson, 366; Cook v. Stearns, 11 Mass. 533.

Had the contract between Moore and defendant Atkinson been reduced to writing, and by deed, it would have created in Moore, I apprehend, by force of our statute, a fee simple in this easement; this "right to dig ore." An estate to him, where no less estate was expressly limited, would have been an estate to him and his heirs. See statute Clay's Dig. 156. But to give to it such an effect, it was indispensable that it should have been in writing. A verbal contract for an easement like this would have no more binding force in law, under the statute of frauds, than if it had been simply for the land itself.

But if it be devoid of efficacy as a contract of sale, because not reduced to writing, is it therefore void for all purposes? Not altogether. It may still serve the purpose of a license. And what is the extent to which it can go as such? A license merely—a verbal license—is the right to do a particular act, or a series of acts, without any interest in the land. Such a license will exempt a party from an action of trespass for entering the land of another to dig ore, and will give him the property in the ore which is actually dug under it. Doe v. Wood, 2 B. & Ald.; 1 Crabb R. P. 96. But such a license is revocable at any time, at the pleasure of him who gives it. We do not mean that all verbal licenses are revocable at pleasure; there are distinctions to be observed; but only such a license as that we are now considering. 1 Mass. 533; 4 John. 81; 1 Crabb, 425.

Such a license moreover is not assignable; the privilege it confers is personal to him to whom it is given. The conveyance of the land to another would be a revocation of such a license. Wallis v. Hamson, 4 M. & W.

Having ascertained the principles by which we can determine between the conflicting claims of the plaintiff to enter the enclosure, and of the defendants to repel him from effecting such entrance, we will now proceed to consider that question.

The license given to Moore, and the digging and carrying away ore for years under it, would not have given to him even, much less to the plaintiff, the possession of the ore

bank as against the owner. The possession remained during all the time with the legal title in defendant Atkinson, and this was even more emphatically true of the enclosure in which it was situated, in which defendants had a crop growing at the time. The idea of an adverse possession either in Moore, or Riddle to whom he sold, upon which the counsel for plaintiff seemed somewhat to rely, has no just foundation. The possession of the enclosure was with all the defendants at the time, with the defendant John F. Atkinson as owner, and with the other defendants as his co-partners in cultivating the same.

No license to enter on that possession existed in the plaintiff at the time of the affair. The license that had been given was personal to Moore, and could not be transferred to the plaintiff. But such a license was revocable at pleasure, and if the right to enter had been claimed by Moore himself, instead of plaintiff, it was sufficiently revoked by the notice to the wagoner the day before, and at all events by the warning to the plaintiff not to enter at the time of the difficulty. He persisted, however, supposing, no doubt, that he was only maintaining his lawful right. In this he was mistaken. It behooves a man to proceed with great precaution, when he determines to vindicate a supposed possession against another who is in or on the premises. As must appear from the principles already stated, the possession, and the right in law to defend and maintain that possession against all the world, was with the defendants. It follows that plaintiff, in making the attempt he did to enter the enclosure, was himself a trespasser, and that defendants were justified in repelling his attempt.

These views sufficiently indicate that we find no error either in the charges given by the court, or in the refusal to charge as plaintiff requested.

The next assignment of error relates to the admissibility of the evidence showing that plaintiff, after alluding to certain threats of the defendants, had spoken in a very contemptuous manner of the defendant, John F. Atkinson, and had made threats of what he would or could do with him in certain contingencies, before the beating took place, although the witness stated that he had not told the defendant of this until sometime afterwards.

One point made in the case of the plaintiff, in the trial below, as appears from the record, was, that admitting the lawfulness of defendants' possession, the beating was excessive and beyond what was necessary for the defence and maintenance of their possession; and that defendants were guilty of a trespass on that ground. I must say, that the facts contained in the record show a case of severe, and it seems to me, unnecessary infliction of personal injury upon the plaintiff; but this was a matter purely for the jury to determine, under all the facts and circumstances of the case, to whom the court properly left it.

We see no good objection to the evidence admitted, at least to a portion of it, and the objection was general.

It was competent to show that angry feelings had arisen between these parties, in regard to their respective rights to the possession of the ore bank, previous to the beating, in order to show that plaintiff would naturally expect and come prepared to meet a vigorous resistance, if he was determined to proceed to assert his right to the possession by force, and this might serve to palliate or excuse the conduct of the defendants.

There is no error in the record, and the judgment below is affirmed.

BROWN *vs.* THE BRANCH BANK AT MONTGOMERY.

1. If an execution is issued on a judgment after the defendant has obtained his certificate of discharge in bankruptcy, he may set it aside on motion.
2. But he cannot move to have his discharge entered of record, for the purpose of preventing the issuance of execution, before the plaintiff has sued out an execution. (CHILTON J. and LIGON, J. *dissenting.*)

ERROR to the Circuit Court of Montgomery.
Tried before the Hon. George D. Shortridge.

The Branch Bank at Montgomery recovered a judgment against Duncan McRae and Samuel N. Brown, in the Circuit Court of Montgomery, for two hundred and forty-five dollars.

After the recovery of the judgment Brown was declared a bankrupt, and obtained his certificate of discharge. He then moved the Circuit Court to enrol his discharge, with the view of preventing the issuance of an execution on the judgment, and showed that the debt on which the judgment was founded came within the act of Congress, and was discharged by it. The Bank resisted the motion, but did not contest the validity of the certificate. The court refused the motion, to which Brown excepted, and he now brings the case to this court by writ of error.

N. HARRIS, for plaintiff in error.

1. It is the right of a party, against whom a judgment has been rendered, from which he is afterwards discharged by matter arising subsequent to its rendition, to have his discharge entered of record, in order that he may be protected against execution on the judgment. Kemp & Buckey v. Herndon, decided at June Term, 1848, but not reported; Childs v. Franklin, 10 Ala. 81.

2. The reason of this rule is obvious. When execution issues on a judgment against a party who afterwards obtains his discharge in bankruptcy, the sheriff is bound to execute such process against the goods of the defendant. Cogburn & Powell v. Spence & Elliott, 15 Ala. 549.

JOHN A. ELMORE, *contra.*

DARGAN, C. J.—All the authorities, both English and American, agree, that if an execution is issued after the defendant has obtained his certificate of discharge, he may set it aside by motion. 1 Bosanquet & Puller 426; Tarleton v. Fisher, Douglas' Rep. 646; 2 W. Blackstone 1190; 7 Metc. 247; 9 John. 259; 9 Wendell 431; 6 Hill 247; McDougald v. Reid et al., 5 Ala. 810; Mabry, Giller & Walker v. Herndon, 8 Ala., 849; Cogburn & Powell v. Spence & Elliott, 15 Ala. 549. But I can find no case, except one hereafter referred to, in which the Bankrupt has moved to have his discharge entered of record, for the purpose of preventing the issuing of an execution, before one had been sued out; and to allow him to do it, before execution is issued, and whilst the creditor is passive, would enable him to become the actor,

and compel the creditor to join in a contest respecting the validity of his discharge, or to abandon his right to sue out his execution. The Bankrupt Act intended to clothe the bankrupt with a complete defence against all his debts, discharged by the act; and we shall give full effect to the act, by confining his certificate to a defence only, denying him the right to become the actor whilst the creditor is passive.

In the case of Kemp & Buckey v. Herndon, this court did sanction the practice of allowing the bankrupt to enrol his discharge upon the record, for the purpose of preventing the issuing of an execution. But on reflection we are satisfied, that the practice thus sanctioned by that case is not sanctioned by any other decisions, and will probably lead to more injury than benefit. At all events, it enables the bankrupt to become the actor, and to compel the creditor to make up an issue with him, at such time as the bankrupt may select, to test the validity of his discharge, or submit to the loss of his right to sue out execution. This, we think, ought not to be done. The creditor has the right, at any time before his demand is barred by the statute of limitations, to impeach the certificate for fraud, and he may select his own time to begin. The bankrupt has his discharge, which he may rely upon as a defence, but he should not be allowed to become the actor, whilst the creditor is taking no steps to coerce the payment of his debt. If the creditor moves, he may arrest his action by interposing his certificate, but he should not be allowed to do more .The case of Kemp & Buckey v. Herndon, which has never been reported, must be overruled; it sanctioned a novel practice, not justified by the rules of law.

Let the judgment be affirmed.

CHILTON, J.—By the fourth section of the bankrupt act, if the party seeking the benefit of the law, shall *bona fide* comply with its requirements, he is declared to be entitled to a full and complete discharge from all his debts, to be decreed by the court, and a certificate thereof is to issue to him, "which discharge and certificate, when duly granted, *shall in all courts of justice be deemed a full and complete discharge of all debts*," &c., and "*may be pleaded as a full and complete bar to all suits whatever;* and the same shall be conclusive evidence of

itself in favor of such bankrupt, unless the same shall be impeached for some fraud, or wilful concealment of his property or rights of property," &c.

Under the operation of the above section, it is admitted by all, that judgments rendered against the bankrupt, and which do not fall within any of the exceptions contained in the statute, *are fully and completely discharged* by the decree, and the decree and certificate are not only available as a *bar* to any *suit* which might be brought upon such judments; but they are to be *deemed a discharge* in all courts of justice, whenever judicially and legally brought to their notice, unless impeached for fraud, &c.

It occurs to me, it would be productive of much hardship to require the bankrupt to give bond, with security in double the amount of the execution, which, in case he should chance to fail, is to have the force and effect of a judgment for the amount of the execution, interest and cost, however disproportioned that might be to the value of the property levied on, Clay's Digest, p. 208; or else, to stand by, with a valid discharge in his hand, and have his property sold, and thus be turned round to a doubtful remedy for damages, which, in many cases, might prove abortive. It is manifest, that in many cases, great injustice will be done the bankrupt, by compelling him to wait until the creditor shall overwhelm him with an execution, and that unless he can invoke the aid of the court by way of preventive justice, he will often be remediless, and his discharge fruitless and unavailing.

This consideration has induced me to look narrowly into the powers inherent in the common law courts, to ascertain whether any relief can be granted; whether it has not the power, so to control its process as to prevent it from becoming an engine of oppression, as between its own suitors; whether, in fine, it may not stay proceedings on a discharged judgment, as well as quash them after they shall have worked, in many cases, irreparable injury to the defendant. In this State, and indeed in most of the States of the Union, it is the uniform practice to grant the same relief on motion, which was formerly obtained by the writ of *audita querela.* Lockhart v. McElroy, 4 Ala. Rep. 572; Baker v. Judges of Nester, 4 Johns. Rep. 191; Smook v. Dade, 5 Ran. Rep. 639;

Longworth v. Screven, 2 Hill S. C. Rep. 298. This old writ of *audita querela* was provided by the common law as a proper remedy, where matters of discharge had arisen after judgment, and was in the nature of an equitable remedy. 1 Bacon's Abr. 307; Bla. Com., vol. 3, p. 405. It lay, not only as a remedy for relief for injuries already committed, but as a measure of preventive justice, and in many cases, the party threatened with impending and probable injury could obtain relief *audita querela quia timet.* Such was the case of Turner v. Davies, 2 Saund. Rep. 149, 150; see also Tidd's Pr. 212, 213.

In our own courts, we all know the uniform practice is, to allow a party who has paid a judgment to enter satisfaction of it upon the record, by motion to the court, and on reasonable notice to the opposite party. So, also, if two judgments are rendered on the same instrument against different individuals, and one of them be paid, satisfaction will be entered upon the other. Now, I am wholly unable to distinguish cases of this kind, where the discharge has accrued by reason of the payment of the judgment, from cases of discharge by any other means which the law allows as legal and proper. The *honest* bankrupt is as much discharged from the judgments rendered against him before his bankruptcy, as if he had paid them; and if he is *dishonest, and his discharge fraudulent*, this may be shown by the plaintiff in the judgment, to avoid or bar the entry of satisfaction, as he might show in the case of alleged payment, that it amounted to no discharge; as that it was fraudulently made in spurious currency. In each case, when relief is granted, it is predicated upon the idea that the court has the power to administer preventive justice, *quia timet.* Childs v. Franklin, 10 Ala. Rep. 79, 81.

By a recent decision in New Jersey, the Supreme Court of that State hold, that no execution can properly issue upon a judgment *prima facie* discharged by the bankrupt's certificate, and that the proper practice requires the plaintiff in the judgment, on notice to the bankrupt, to move for execution. Francis v. Ogden et al. 2 Zab. R. 210. This court has held that the execution may issue, so long as the judgment remains open, and that the discharge may be interposed as a reason why it should be superseded and quashed, at which time the

plaintiff in the judgment may make up an issue as to the validity of the discharge. Cogburn & Powell v. Spence & Elliott, 15 Ala. Rep. 549; Mabrey, Giller & Walker v. Herndon, 8 Ala. Rep. 848. I do not understand any case, however, to have gone the length of holding, that the bankrupt should wait until an execution is issued and levied, before he may move in the court in which the judgment was rendered, to stay the execution, by enrolling the certificate of discharge. Indeed, this court has expressly held the reverse in Kemp & Buckey v. Herndon, (June Term, 1848,) in which the Circuit Court of Autauga allowed the bankrupt to have entered upon its record a perpetual stay of execution, and this was held to be entirely regular by this court. I think the position I assume is not in conflict with any adjudged case of our own—is in advancement of justice, as well as sustained both by reason and authority. See 1 B. & P. 426; 1 Cow. Rep. 42, 44, 165; 1 Caine's Rep. 249; 4 John. Rep. 191; 9 Wend. 431; 6 Hill (N. Y.) Rep. 247; 9 John. Rep. 259.

With all possible respect for the opinion of a majority of the court, I feel constrained by my views of the law, and the powers of the courts to mould their practice so as to secure its proper administration, to dissent from their conclusion. There is nothing in the argument of a majority of the court, that the bankrupt should not become an actor, so as to bring on the contest, and force the judgment creditor to test the validity of his discharge before he is ready, which would not be equally applicable to all cases, where matters arising subsequent to the judgment are set up to avoid or satisfy it. Besides, the court has a discretion in all such cases, to continue the cause, and allow a reasonable time to the party seeking to contest the discharge to prepare for the contest.

LIGON, J.—Concurs in the foregoing views of my brother Chilton.

TUCKER ET AL. *vs.* HOLLEY ET AL.

1. When several complainants join in a bill, asking relief against a judgment at law, against which some of them show no ground for equitable relief, the bill is demurrable.
2. A party asking equity must offer to do equity.

ERROR the the Chancery Court of Pike.
Tried before the Hon. J. W. Lesesne.

This bill was filed by the plaintiffs in error, asking a perpetual injunction against a judgment at law. It alleges, that the County Treasurer of Pike commenced suit in the County Court against Tucker, who was County Clerk, for a breach of official duty; that Tucker appeared, and pleaded in abatement, and his plea being sustained, leave was given to the plaintiff to amend; that defendant again pleaded in abatement, demurred, moved to quash, and excepted to the ruling of the court; that the court overruled his motion, plea, and demurrer, refused to sign his bill of exceptions, and ruled him to trial; that he then offered to plead the statute of limitations, but the court would not allow him to do so; that there were no counsel at the court, except those engaged against him; that judgment was rendered against him and his securities on his official bond, for a large amount; that he afterwards applied to the clerk of the court for a writ of error to the *Supreme* Court, and he and his securities signed their names to a blank bond, which they left with the clerk to be filled up in proper form; that the clerk failed and neglected to send up the case to the *Supreme* Court, but issued his certificate that a writ of error to the *Circuit* Court had been applied for and granted; that on this certificate, the judgment of the County Court was affirmed in the Circuit Court, against the original defendants in the judgment and their securities on the writ of error bond, with ten per cent. damages; and that an execution had been issued on this judgment, and levied on Tucker's property. The securities on the official bond of Tucker, and also his securities on the writ of error bond, are joined with him as complainants.

The Chancellor dismissed the bill for want of equity.

BUFORD, for plaintiff in error.
JACKSON, *contra.*

CHILTON, J.—The decree of the Chancellor, dismissing this bill, is correct. There is no equitable ground shown for impeaching the judgment of the County Court, and although the securities on the writ of error bond would be entitled to relief, upon establishing the facts alleged in the bill, yet they have united as co-complainants with Tucker and his securities on his official bond, and pray joint relief against the judgment at law, as against which the latter show no equity, and according to the established doctrine of this court, the bill was demurrable for this cause. See Wilkins & Wilkins v. Judge & Dunklin, 14 Ala. Rep. 135, and cases there cited; also Whitaker v. Degraffenried, 6 Ala. Rep. 303. Tucker and his securities, if the bill be true, could be relieved against the ten per cent. damages given on the affirmance in the Circuit Court; but to entitle them to it, they must do equity, pay, or tender the amount of the judgment of the County Court, interest and cost, which they have neither done nor offered to do.

Decree affirmed.

BAGBY, GOVERNOR, &c. *vs.* REEVES, ET AL.

1. When an execution is levied upon the lands of the defendant, and before the sale another execution issued on an older judgment comes to the hands of the sheriff, the plaintiff in the senior judgment is entitled to the proceeds of sale.

ERROR to the Circuit Court of Pike.
Tried before the Hon. John D. Phelan.

The Branch of the Bank of the State of Alabama at Montgomery, recovered a judgment against Lucien Reeves on the 27th November, 1841, for $430 $\frac{50}{100}$, on which execution regularly issued. Four other executions were subsequently issued at irregular periods on the same judgment, the last of which was issued on the 27th November, 1850.

A. P. Bagby, Governor, &c., for the use of Pike County, obtained a judgment against Reeves on the 18th September, 1843, for $448 $\frac{44}{100}$. Execution was regularly issued on this judgment, an *alias* and a *pluries*, the latter of which, issued on the 7th November, 1850, was levied on the lands of the defendant. The land was sold by the sheriff, who at the time of the sale also had in his hands the execution in favor of the Branch Bank at Montgomery. Both parties claimed the money, and the sheriff brought it into court, and asked directions for its appropriation.

The court directed him to pay it to the execution in favor of the Branch Bank, and this is now assigned for error.

MARTIN & BALDWIN, for plaintiff in error.

LIGON, J.—There can be no doubt that the money arising from the sale of the lands levied on by the sheriff, was rightly appropriated by the judgment and direction of the court below. The judgment of the Branch Bank was nearly two years prior in point of time to that in favor of the plaintiff in error. It created the first lien, and was consequently entitled to priority of satisfaction. Campbell v. Spence, 4 Ala. 543; Quinn v. Wiswall, 7 ib. 645.

Let the judgment be affirmed.

WRIGHT *vs.* LINDSAY.

1. When "not guilty," and "justification" are pleaded to an action of slander, the latter plea does not amount to an admission of record of the speaking of the words charged. The statute (Clay's Digest, 332, § 109) confers upon the defendant the right to plead as many matters as he may think necessary to his defence.
2. In an action of slander for words spoken, charging the plaintiff with stealing, if the words are proved to have been spoken in relation to a transaction which would not amount to a charge of larceny, such proof will protect the defendant from all legal consequences, except those resulting from *special* damages.
3. A bailee could not be guilty of larceny at common law, by a fraudulent conversion of the deposit.

ERROR to the Circuit Court of Jackson.

Tried before the Hon. Thomas. A. Walker.

ROBINSON, for plaintiff in error.

The facts set out in this record, do not show a partnership between plaintiff and defendant; but an employment of plaintiff, for which he was to receive of defendant a portion of the product of his labor. Moore v. Smith, January Term, 1852.

If this be so, it is clear that the court mistook the law, in holding that the charge amounted only to a breach of trust.

By the 31st section of Penal Code, Clay's Digest, 421, a fraudulent conversion of the whisky by plaintiff would make a larceny.

The words spoken then amounted to a charge of larceny; and the fact that the court referred these words to plaintiff's failure to account for all the money, cannot relieve them from their actionable character. The Circuit Court should have left it to the jury to say whether or not plaintiff had been guilty of a fraudulent conversion. But by its charge, it withdrew this question entirely from their consideration.

C. C. CLAY, JR., for defendant in error.

I. The plaintiff was not entitled to the charge asked.

1. It was in conflict with that already given and not excepted to, and would have taken from the defendant the benefit of the former charge.

2. It would have nullified the plea of "not guilty," and would have shifted the entire onus of proof on the defendant, requiring of him to prove plaintiff had committed a larceny, notwithstanding his failure to show that defendant had uttered the words charged. This would have been in violation of the rules of pleading and evidence. Gould's Pleadings, 432–3; Pope v. Welsh's Adm'r, 18 Ala. Rep. 631; Doss v. Jones, 5 How'd (Miss.) 159; 2 New Hamp. Rep. 89.

3. It was abstract and wholly unsustained by the evidence.

II. The charge given was correct.

1. The defendant had a right to show that the words, although *prima facie* importing felony, were not used in an actionable sense, and were not so understood by the hearers. Williams v. Cawley, 18 Ala. 206; 8 Ala. 510; 5 N. Hamp. 203; 1 Campb. 48; 3 Brevard, 38; 9 New Hamp. 156; 15 Vern. 245; 7 Monroe, 314; 2 Wheat. Selwyn, 1270.

2. A partner cannot commit larceny of the goods of the firm. To sell and not account, is a mere breach of trust. The charge as made by defendant did not impute to plaintiff a crime, either at common law or under any statute. 2 Wheat. Selwyn, 1269 and *note.*

3. If, however, the evidence does not show that plaintiff was a partner of defendant's, and the court should hold the former the mere agent or clerk of the latter, still the words were not actionable, as they did not import a crime at common law, or under the statute relied on, Clay's Dig. 421, § 31. The time when the plaintiff was the partner or agent of defendant, and when the whisky was taken and unaccounted for by plaintiff, was in 1840, or early in 1841, as the proof shows. The Penal Code did not become the law of the State till 2d November, 1841, when the Governor's proclamation issued. See Pamph. Acts, 1840–1, p. 132, § 31, and p. 192, § 28; last section of Penal Code and Gov.'s proclamation; Pamph. Acts of 1841–2, p. 182. Hence, whether plaintiff was partner, agent or clerk of defendant, his (plaintiff's) act was a mere breach of trust and no crime. 2 Wheat. Selwyn, 1270; Russell on Crimes.

III. But, though the charge was erroneous, and defendant's words were actionable, yet the court should not reverse, as the proof shows plaintiff was not entitled to a verdict; his admission of the truth of the charge being proven.

GOLDTHWAITE, J.—This was an action brought by the plaintiff in error, against the defendant in error, for slander, in charging him with stealing whisky; to which, not guilty, and justification were pleaded. On the trial, the speaking of the words was proved, and the defendant then introduced testimony conducing to prove that in the latter part of the year 1840, or the early part of 1841, before the speaking of the words, "the plaintiff was a partner of the defendant, employed in distilling whisky," and that for his services, he was to receive the one-sixth or one-seventh gallon of all that was made, and was authorized to sell to such persons as wished to purchase; that on several occasions he had disposed of whisky, and failed to account for the same. The evidence also tended to prove that the charge was made with reference

to the whisky which the plaintiff had disposed of, and in relation to his failure to account for the same while connected with the defendant.

The court, on the part of the plaintiff, was requested to instruct the jury that the defendant, by his plea of justification, admitted the speaking of the words as charged, and that in order to sustain the plea, it was necessary to prove that the plaintiff had committed a larceny. These instructions were refused, and the court charged, that the defendant was only bound to show a legal justification, which might be done by proving that the words were spoken with reference to the taking of the whisky during the existence of the partnership, which would make it a breach of trust, and not a larceny; and that in that view of the case, the words would lose their actionable character, and the plaintiff would not be entitled to recover, without proof of special damage.

The refusal to give the instructions requested, and the charge as given, are assigned for error in this court.

We are of opinion, that there was no error in refusing to give the instructions requested. If the plea of justification had been pleaded by itself, it was certainly true, that it would in that case have operated as an admission of record of the speaking of the words charged; but when, as in this case, it was pleaded with the plea of not guilty, to hold that it amounts to such an admission, would be, in effect, to abrogate the statute which confers on the defendant the right, in civil actions, of pleading as many matters as he thinks necessary to his defence. Clay's Dig. 332, § 109. The decisions of other States upon similar statutes, and in England on the statute of Anne, which extends to defendants, by leave of the court, the same privileges which are conferred by our own statute as a matter of right, are conclusive, as to this point. 2 New Hamp. 89; 5 S. & R. 411; 5 Taun. 228; 18 Ala. Rep. 631.

Can the exception to the charge be sustained? We think not. We understand the charge as given, upon a fair construction, to amount to no more than the assertion of the proposition, that if the words were proved to have been spoken in relation to a transaction which could not amount to the charge of larceny, that such proof would protect the defendant from all legal consequences, except those resulting from

special damages; and this we understand to be the law, as decided by this court in Williams v. Cawley, 18 Ala. Rep. 206. The charge may not have been correct in relation to the plea of justification, but if it was properly applicable to the plea of not guilty, it could not be regarded as error; as that plea, if sustained, would be a full answer to the declaration.

It is insisted, however, that, although in the bill of exceptions the plaintiff is referred to as the partner of the defendant, and the term partnership is used to designate the connection which existed between them; that the evidence as stated upon the record, shows that such was not the relation between them at the time of the transaction to which the charge made by the defendant referred; that instead of being the partner, the plaintiff was but the agent or bailee of the defendant, and that under the statute of this State, (Clay's Digest, 321, § 31) the fraudulent conversion of goods, by one occupying that position, might be larceny, and that in this point of view the court erred in directing the jury that the transaction could not amount to a larceny. We regard it as unnecessary to determine whether the fact of the copartnership is negatived by the bill of exceptions. If the plaintiff was not the partner of the defendant, it is conceded that he was the bailee, and by the common law, the bailee could not be guilty of larceny by the fraudulent conversion of the deposit. The statute relied on by the plaintiff in error had no operative existence until the 2d November, 1841, (Acts 1840, 192; Acts 1841, 182) while the transaction to which the charge referred, is shown upon the record to have occurred in the latter part of 1840, or the early part of 1841.

The judgment is affirmed.

BRANCH BANK AT MONTGOMERY *vs.* PARRISH.

1. When a person procures a note to be executed by others, whom he knows to be insolvent, for the purpose of getting it discounted at the Bank, and to be recommended to the Bank as a good note, by another person from the same county with the makers, who was in the habit of recommending notes to the Bank for discount, telling him that he intended to pay the note himself, and the note is discounted by the Bank, and the money paid to him, he is liable to the Bank in an action for money had and received, and an express promise to pay is unnecessary.

ERROR to the Circuit Court of Pike.
Tried before the Hon. George Goldthwaite.

THIS was an action of ASSUMPSIT, by the Branch Bank against Parrish. There was a special count, and the common counts for money *lent*, and money *had and received.*

There was evidence tending to show, that the defendant had procured three other persons, who were proved to be wholly insolvent at the time, and who were known to be so by the defendant, to make a note payable to the Branch Bank: that defendant took it to Montgomery, to get it discounted, and procured one Reeves, who was then a member of the legislature from the county of Pike, and in the habit of recommending notes to be offered to the Bank for discount, to recommend it as good, and defendant afterwards offered it to the Bank for discount. The note was discounted for five hundred dollars, and the money was paid to the defendant. Defendant told Reeves, at the time he requested him to recommend the note, and after he received the money, that he intended to pay the note.

The court charged the jury, that if the defendant procured the makers to make the note, and that it was discounted by plaintiff, on the recommendation of Reeves, procured by the defendant, he would not be liable in this form of action, unless he promised the *plaintiff* to pay the money.

Also, that if the jury believed the defendant did not promise the plaintiffs, a recovery could not be had against him, although they might believe that he did make such promise to Reeves, at the time he obtained his recommendation, and after he obtained the money.

To these charges defendant excepted, and now assigns them for error.

WILEY, for plaintiff in error.

BUFORD, *contra.*

PHELAN, J.—The defendant, if the facts stated in the bill of exceptions were true, was liable to the plaintiff in error, for "money had and received," upon an *implied assumpsit*, without any express promise whatever. If he, knowing that the makers of the note were utterly insolvent at the time, procured this note to be made by them, for the purpose of having the same discounted by the Bank as a good note, and for the same purpose procured it to be recommended by the member from the county, who was in the habit of recommending notes to the Bank for discount, and the note was discounted by the Bank under the influence of this fraud and deception, thus practiced upon it by defendant, and defendant received the money as the fruit of this fraud, he would be liable to an action for money had and received, at any moment when the fraud was discovered.

The action for money had and received is said to be a liberal and equitable action, and lies wherever, by the principles of natural justice and equity, the defendant ought to refund to the plaintiff his money, and there is no rule of policy or strict law to prevent him from so doing. 10 S. & R. 219, Irvine v. Harlon; Hitchcock v. Lukens & Son, 8 Por. 337; Stephens v. Badcock, 3 B. & A. 354.

When one person discounts for another, a forged navy bill, who passed it without knowing it to be forged, the money paid may be recovered back in this action. Jones v. Ryde, 1 Serg. & Low. 167; see, also, 5 Conn. 71, Eagle Bank v. Smith; 6 John. 110, Wilson v. Force; Pope & Hickman v. Nance & Co. 1 Stewart, 354.

In Mason v. Waite, 17 Mass. 354, bank notes were entrusted to the care of a person who lost them at play. The action was for money had and received, and plaintiff recovered. The court say, in that case, there is no necessity of any privity of contract, to authorize this action. It is true, there need not be any agreement between the parties, to enable

the plaintiff to maintain this action, as many of the foregoing cases show, but then there must be a privity between the parties in the transaction out of which the action springs. It may arise from a *tort*, but a party may generally waive the *tort*, and sue as upon a contract; an *implied assumpsit.* Young v. Marshall, 8 Bingham, 53; 1 Stephens' Nisi Prius, 346.

The doctrine as to the necessity of privity between the parties when this action is used, is well discussed in a late case in Georgia, Whitehead v. Peck, 1 Kelly, 140, in which the court held, that where a surety had paid usurious interest to the creditor, and the principal had repaid it to his surety, that the principal could not sustain an action for money had and received against the creditor, for the usurious interest so paid to him.

In the case at bar, the defendant offered a note on persons wholly insolvent, and whom he knew to be so, to the Bank, for discount, which note he had procured to be made for this purpose, and which, to further his dishonest purpose, he procured Reeves to recommend as good, and obtained the money upon it. Under such a state of facts, the ownership of the money was not changed. It remained the property of the Bank during all the time, and an action for money had and received would well lie at any time. An action on the case would lie, or the Bank might waive the *tort*, and sue as upon an *implied* assumpsit for money had and received.

The charges of the court proceed upon the idea, that the Bank could not recover, unless the defendant had made an express promise to the plaintiff. This was not necessary, as has been shown.

The judgment below is reversed, and the cause remanded.

JOHNSON AND WIFE *vs.* COLLINS.

1. When several are bound by an executory contract to make titles to a vendee, all must join in the conveyance in order to a complete performance of the contract.
2. But when two or more are bound for the performance of one duty, and the

obligee accepts from one of them something in satisfaction of the duty, and in lieu of a strict performance, this shall discharge all; for the obligation, being satisfied and discharged as to one, is necessarily satisfied and discharged as to all.

3. When a bond for titles is executed by two, and the obligee afterwards accepts from one of them a deed executed by himself and a third person, it is a question for the jury to determine whether the deed was accepted in satisfaction of the bond.
4. When an obligation is not completely performed, and the obligors insist upon satisfaction in lieu of performance, the burden of proof is upon them to show that the thing done or given in lieu of performance *was accepted by the obligee, and intended as a satisfaction.*
5. When two execute a bond for titles, and the obligee afterwards accepts a deed executed by one of them and a third person, and subsequently releases the obligor who executed the deed from all the covenants therein contained, the release does not affect the liability of the obligors on their bond.
6. In debt on bond executed by two, defendant pleaded satisfaction, and proved that a deed executed by one of the obligors and a third person had been delivered to, and accepted by the obligee. The court charged the jury, that if they believed that the deed was accepted by the obligee, in full discharge and satisfaction of the bond, then the bond was extinguished; that whether it was so accepted or not, must be determined by the testimony of the case relating to that matter; and that if the bond was not surrendered or cancelled at the time the deed was delivered, and there was no agreement or understanding between the parties that it was to be surrendered or cancelled, then the presumption was that the deed was not taken in full discharge and satisfaction. *Held,*

   1. That the charge was not erroneous.
   2. That a charge was properly refused, which withdrew from the jury the *intention of the parties* in making and accepting the deed relied on as a satisfaction of the bond.

ERROR to the Circuit Court of Marengo.

Tried before the Hon. John D. Phelan.

This was an action of debt, brought by John Collins against Johnson and wife, on a bond executed by James Martin and Sarah Martin, now the wife of the defendant Johnson, whereby they bound themselves to John Collins in the penal sum of thirty-two hundred dollars, with a condition, to be void if the obligors, within a reasonable time, should make or cause to be made unto the obligee a good and lawful title, free from all incumbrances, to a certain tract of land described in the condition of said bond. On the trial it appeared that James Martin was the administrator of Peter Martin, deceased, and supposing that the land belonged to his intestate, applied to the Orphans' Court and obtained an order of sale, under which

the land was sold, and he, the said James Martin, became the purchaser at such sale. After the sale, and in the year 1839, James Martin and his wife Esther executed a deed to Collins, with full covenants, by which he conveyed the land described in the bond. It further appeared, that Collins paid eight hundred dollars at the time the bond was executed, and received the possession of the land, and upon the execution of the deed by James Martin, he paid the further sum of eight hundred dollars, which constituted the amount agreed to be given for the land; but Collins did not give up the bond when the deed was executed, nor does it appear that anything was said in reference to it. After this it was discovered that Peter Martin, the intestate, had no title to the land, but that it belonged jointly to his widow, Sarah Martin, who executed the bond, and to her infant children; and suit being brought at law to recover the possession from Collins, he filed his bill in equity to enjoin it, but obtained a decree only for the undivided part or interest of Sarah Martin, and consequently her children recovered of him their interest. It also was shown that Collins had released James Martin from all the covenants in the deed, but the release made no reference to his liability on the bond. There was evidence introduced, taken by deposition, which tended to prove that Collins considered the deed executed by James Martin as a satisfaction of the bond, but there was no instrument in writing executed by him, which showed that he did receive said deed, either as a full performance of the bond, or as a satisfaction thereof. The court instructed the jury, first, that if they found from the testimony that the deed from James Martin to the plaintiff Collins was taken and accepted by him, in full discharge and satisfaction of the bond for titles, then said bond is extinguished and dead in law, and this suit cannot be sustained; and that whether it was so accepted or not, was to be determined by the testimony of the case relating to that matter; that if the bond was not surrendered or cancelled at the time the deed was made, and there was no agreement or understanding between the parties that it was to be surrendered or cancelled, then the presumption is that the deed was not taken in full discharge and satisfaction of the bond. Secondly, that the acceptance of a deed from one, when the bond is made by two,

does not raise the presumption that such deed was taken in full discharge and satisfaction of the bond as to both the obligors. The court refused to charge, as requested by the defendants, that if the jury believed the whole evidence, they must find for the defendants.

BROOKS & BYRD, for plaintiffs in error:

1. The acceptance of the deed of Martin by Collins, was a discharge and satisfaction of the title bond. 10 Johns. 306; 1 Watts & Serg. 83; ib. 442.

Where a deed is accepted unconditionally, as in this case, the law presumes it to be in satisfaction of the bond. 10 Johns. R. Supra. 306.

But the evidence clearly shows that the acceptance of the deed was in satisfaction. In the first place, it was well known to Collins that the obligors had no title to the land; then the mode of procuring title was fairly understood and agreed upon. In pursuance of the agreement, Martin procured from the Orphan's Court an order for the sale of the land, had it sold, and became the purchaser. This, as *Collins* swears, was done "*for the purpose of carrying out in good faith the said contract.*" Martin then makes a deed to Collins. *This was the very title contemplated by the parties*, and was considered a good title, for Collins swears that he was to pay the remaining half of the purchase money "*when the titles and conveyance to him were completed.*" When the deed was tendered, he accepted it without any condition or qualification, and paid the balance of the purchase money without objection, and this was more than three years after the making of the contract. Why was the deed accepted and the money paid? Because the title was supposed by all parties to be good and sufficient. The deed being accepted with that understanding, of course all parties considered the stipulations of the bond fulfilled, and the bond satisfied.

And again: when Collins desired to make Martin a competent witness in his land suit, to support his title to the land, he released Martin, not from the covenants in the bond, but from the covenants of the deed, and observed to Martin that "*he was then released from any responsibility about the land;*" thus clearly showing that he did not consider Martin respon-

sible upon the bond. Martin also says that he considered himself discharged from all obligation which he had come under in regard to the land.

The retaining of the bond by Collins does not conflict with this view of the case, for he had a right, and it was his duty to himself to retain it as a part of his chain of title. Besides, it was not demanded.

2. The fact of there being two obligors can make no difference. The bond stipulated for the performance of but *one duty*, that was, the making of a good title, or of what was *considered* a good title to the premises, and a performance by either was a discharge of both. Cheetham et al. v. Ward, 1 Bos. & Pull. 630. And the obligee has it not in his power to discharge one obligor without discharging both. A release to one operates as a release to all. 7 Bacon Abr. 255; Cheetham et al. v. Ward, 1 Bos. & Pull. 630.

3. In this case Martin cannot be sued upon his bond, because he has made a deed, and he cannot be sued upon his deed, because he was released therefrom. To hold Mrs. Johnson liable, would present the anomaly of the surety being held responsible upon the bond, while the principal obligor was discharged therefrom by a voluntary arrangement between him and the obligee, without her privity or consent.

4. If the deed was made in good faith, and it was supposed by all the parties that at the time of its acceptance it conveyed a good title, then the bond was discharged. Such would necessarily be the understanding of the parties. It is not to be supposed that the bond was to be held up, in order that the validity of the title conveyed by the deed might be tested at some future day. It was at the time it was offered for acceptance that the sufficiency of the deed was to be determined If Collins had then deemed it insufficient, he would have rejected it. If he believed it sufficient, he would have accepted it, as a fulfilment of the stipulations of the bond, and paid the balance of the purchase money, as he did.

5. The charge was erroneous. If correct abstractly, it was calculated to, and did mislead the jury.

6. Upon the whole evidence, the plaintiff was not entitled to recover, and the charge asked for should have been given.

A. R. MANNING, *contra :*

1. It is true, that when one who has contracted to convey land to another, executes to him a deed of conveyance of the land, and the latter accepts it, *prima facie*, and only *prima facie*, the contract is discharged. 10 J. R. 297; 4 Watts Rep. 405; 9 Watts Rep. 12.

Why? Because the law does not suppose that either the grantor or the grantee would desire (there being no reason why they should,) two or more separate assurances of title to the same parcel of land, to be in force between them, when only one is necessary or usual. But when two persons (as in this case,) or more, are under covenant to make or cause to be made a good title, and only one of them makes the deed, and that with warranty, the interest of both him who makes and of him who receives the deed, requires, and they therefore must be presumed to intend, that the covenant shall not be discharged. For then, if the title conveyed by the deed be not good, the grantor can make his co-obligor contribute with him toward the indemnification of the grantee; and the grantee will have recourse against two or more, instead of only one. The deed ought, therefore, to be considered as only one act toward the performance of the contract; toward causing to be made a good and lawful title, free from incumbrances.

If such were not the presumption of law in a simple case, (such as that supposed,) certainly it would be in a case like this, in which the known facts show, that according to law, (which all are presumed to be acquainted with,) the title to a part of the land, when the deed was made, was in the very co-obligor who did not join in making the deed, and when the obligee (Collins) kept and retained the title bond; that in some cases of even one obligor only, his bond is not discharged by his subsequent conveyance, of the same land to which the bond related, to the obligee, see 2 Penn. (Penrose) Rep. 528; 9 Watts Rep. 12. A covenant by three to convey land with warranty, is not performed by a warranty deed from one who has the title and release from the other two. 1 Mass. Rep. 191.

Again: By this title bond, James Martin and the defendant Sarah, stipulated that they would make or cause to be made a good and lawful title, free from all incumbrances; and

not, that James Martin should cause the land to be auctioned off under a decree of an orphans' court, bid it in himself, and then make a deed thereof to Collins. These acts, therefore, are not a performance in law of the stipulation; and if they were accepted (as all the pleas of the defendants below in relation to the deed alleged) by Collins, as a satisfaction, or fulfillment thereof, the defendants below had to prove this to the jury. "The distinction between performance and satisfaction is, that the former is the performance in specie of the agreement; the latter is, where the contracting party has done something in lieu of the thing contracted for. * * * The distinction is of great importance, because the *onus probandi*, as to the intention, lies on different parties in the two cases." Batten on Specific Perf. 280–1; 67 Law Lib. 160.

To prove to the jury that Collins accepted the acts and deeds of James Martin as a satisfaction, the defendants below read his bill in chancery against them and others, in which, although he relates what James Martin represented to him, and promised to do, and did do in good faith towards the performance of the contract, he does not say that he (Collins) accepted said Martin's acts and deeds as a satisfaction of the title bond; but on the contrary, sets up the title bond against the plaintiffs in error. And on this and the other evidence, the jury returned that Collins did not accept the deed, &c., as a satisfaction and discharge of the bond.

And this court has decided the same thing, The chancery cause, in which that bill of Collins' was filed, came here; and this very point being made, the solicitor cited in support of it Cullum v. the Branch Bank at Mobile, 4 Ala. Rep. 29, adopting the language of Sugden on Vendors, ch. 9, § 6, declaring that upon the execution of a deed by all the necessary parties, the preceding contract became void, both at law and in equity. But this court decided that the title bond was still operative, and was a good conveyance in equity of Mrs. Johnson's title to a part of the land. And this decision was made in favor of Collins, as complainant. This question is, therefore, here *res judicata.* Collins v. Johnson and wife et al. 12 Ala. Rep. 322.

2. As to the deed of release: That, by express words, relates to the covenants in the deed of conveyance only. It

does not refer at all to the title bond signed by Mrs. Johnson, and cannot therefore release her from that.

The courts are not inclined to extend the very inconvenient and not very just doctrine, that the release of one, of two or more joint and several makers of a bond or promissory note, operates as a discharge of the others. Nothing but a strict technical release is allowed to have that effect. 8 Term Rep. 168; 22 Pick. Rep. 305. And a covenant not to sue, although it may be pleaded as a release, by a sole debtor, cannot be by joint and several debtors. 17 Mass. Rep. 623, 628; 8 ib. 480. And a discharge of one of them by operation of law, does not discharge the other. Much less ought the release of one person, from the covenants of his sole deed, operate as a release of another person from another instrument, on which he is jointly and severally liable with the releasee.

3. In regard to the refusal of the court to charge the jury to find for the defendants below: In a few cases, when the Circuit Judge has given such general charges, this court has sustained them; but it was only, when beyond all question, there was no evidence that would warrant a reversal of the jndgment. Such general charges are both dangerous and inconvenient; dangerous as leading to an invasion by the court of the province of the jury, and inconvenient because leading to an incumbering of the records in common law suits with all the evidence, or all that at the moment can be recollected and truly recited, and enabling new questions to be raised for the first time in the Appellate Court; questions, which if made in the court below, it might have been its duty to obviate by the admission of a little evidence that had perhaps been inadvertently omitted. 15 Wend. Rep. 582–'3; 2 Ch. General Prac. 593; 1 Adolph. & Ellis 3, (28 Eng. C. L. Rep. 17.)

When evidence has been submitted to a jury *on both sides*, it can never be error for the court to refuse the general charge.

The question whether the deed was received in *satisfaction* or not, was peculiarly one for the jury, and it is so presented by all the pleas relating to the deed; so is the waiver or not of performance of a contract, and a non-suit ordered by the

court below was set aside, although all the evidence in relation to the waiver was contained in *a letter*. 17 Maine Rep. 34, (5 Shep.;) 12 Ala. Rep. 527.

DARGAN, C. J.—The obligation on which this suit is brought is subject to the condition, that if the obligors, James and Sarah Martin, should, within a reasonable time, *make or cause to be made* unto the obligee, John Collins, a good and lawful title to the lands therein described, then the bond should be void. This being the condition, it is manifest that it has not been completely performed. James Martin alone executed a deed to the obligee, and this deed conveyed to him no title, because Martin, himself, had none. The rule is, that when several are bound by an executory contract to make titles to the vendee, all must join in the conveyance in order to a complete performance of the agreement. Sugden on Vendors, 9 Ed. 628, 629; Cullum v. The Bank of Mobile, 4 Ala. 21; Lawrence v. Parker, 1 Mass. 191. It would violate the express terms of the contract to hold that a deed, executed by one of several obligors, was a complete execution of the agreement, when such deed gave to the vendee no title at all. As the obligation has not been completely performed, the next question is, has the obligee accepted any thing in lieu of a complete performance, and in satisfaction thereof? If he has, the obligation is saved, for if two or more be bound to the performance of one duty, and the obligee accepts from one of the obligors something in lieu of a strict performance, and in satisfaction of the debt or duty, this shall discharge all; for the obligation being satisfied and discharged as to one, it is necessarily satisfied and discharged as to all, for there is but one duty extending to all, and when this is satisfied the obligation is gone. Cheetham v. Ward, 1 Bos. & Pull. 630; Bacon Abr., vol. 7, 255. It may be, that when a simple contract debt is owing by several, one may stipulate for his own discharge, reserving the liability of the others; authorities are to be found which so hold, and I do not intend to say, at this time, whether I concur with them or not; but when the debt or duty is satisfied by one, there is no longer an obligation resting upon the others. If, then, the deed of James Martin and Esther, his wife, which contained full

covenants, and purported to convey the land described in the bond to the obligee, was accepted by him in satisfaction of the bond, and was so intended at the time of its delivery, I should hold, as the Circuit Court did, that it was a discharge of Sarah Martin, now the wife of the defendant, Johnson. But whether this deed was so accepted or not was a question of intention, a fact, which the jury alone could determine, and the court very properly left it to them to decide, by the instructions which he gave.

The counsel for the plaintiffs in error, however, contend that though it was a question of intention for the jury, yet the acceptance of the deed from one of the obligors, created the legal presumption that it was accepted in satisfaction of the bond, and that the court should have so charged the jury. But admitting that such would have been the legal presumption, if the bond had been executed by James Martin alone, this presumption could not arise in this case, the bond being executed by two, for the deed could only operate by way of satisfaction of the bond; it was not a complete performance of the contract, and when the agreement is not completely performed, and the obligors insist upon satisfaction in lieu of performance, the burthen of proof is upon them, to show that the thing done, or given in the stead of performance, was accepted by the obligee, *and intended as a satisfaction*, Batten on Specific Performance 280; and certainly the law will not raise a legal presumption in opposition to the burthen of proof.

It is again objected, that the latter part of the first charge was calculated to mislead the jury, by impressing them with the idea that if no express agreement or understanding existed between the parties, at the time the deed was delivered, that the bond should be *surrendered or cancelled*, that it was not satisfied or discharged, although the deed was accepted with the intention, and for the purpose of discharging the bond. But taking the charge altogether, we think the jury must have been impressed with the idea, that it was the intention alone with which the deed was received that should govern their verdict, and that if they found this intention to exist, they should render a verdict for the defendant, without regard to the fact whether anything was said in terms about

surrendering or cancelling the bond. Looking at the whole charge, we are unable to perceive that it was calculated to mislead the jury, or improperly influence their verdict.

In regard to the charge refused, that if the jury believed the whole evidence they must find for the defendants, it is enough to say, that though we have sometimes sustained such charges, it is very clear that it would have been highly improper in this case. It would have been a direct invasion by the court of the province of the jury, by undertaking to decide the question of intention of the parties, in making and accepting the deed relied on as a satisfaction of the bond.

In reference to the release given by Collins to James Martin, it only operated on the covenants contained in the deed, and had no effect at all upon the liability of the obligors on their bond.

There is no error in the record, and the judgment must be affirmed.

BENFORD *vs.* DANIELS.

1. An appeal does not lie from an interlocutory order of the Chancellor refusing to dismiss a bill for want of equity.
2. Nor will the Appellate Court take jurisdiction of such an appeal by consent of the parties.

APPEAL from the Chancery Court at Cahaba.
Hon. W. W. Mason, presiding.

GAYLE & GAYLE, for appellants.
LAPSLEY & HUNTER, *contra.*

CHILTON, J.—A motion was made in the Chancery Court in this cause to dismiss the bill for want of equity, and the Chancellor overruled the motion, and held that the bill contained equity. An appeal was taken from his decision to this court, and the counsel agree here to raise no objection to the jurisdiction of this court, but desire our opinion upon the merits of the bill.

It is manifest that there has been no final decree in this cause. It is in the Chancery Court in the same condition in which it was before the motion was made, and it follows that this court has no jurisdiction of the appeal, and having no jurisdiction, it is clear that we are not warranted in taking jurisdiction by consent of the counsel. An appeal lies from an interlocutory order dissolving an injunction by statute, but no statute, and no rule of practice, authorizes us to take jurisdiction of such an appeal as this.

Appeal dismissed.

WIGHTMAN *vs.* KARSNER.

1. The Court of Commissioners of Roads and Revenue in this State has no power to hold special terms, except in cases expressly authorized by law; and all orders made at such unauthorized terms are *coram non judice*, and void.
2. The orders of a court acting without authority are nullities, and may be inquired into, and impeached, in all other courts, before which such orders are brought and relied upon by a party claiming a right or benefit under them.
3. A claim against a county, audited and allowed at an unauthorized term of the Commissioners' Court, creates no liability on the county, and the county treasurer may rightfully refuse to pay it.

ERROR to the Circuit Court of Lauderdale.
Tried before the Hon. L. P. Walker.

Motion against county treasurer under the statute.

The plaintiff in error moved for judgment against the defendant as treasurer, of the county of Lauderdale, in the Circuit Court of said county, on a certificate of allowance of a claim in favor of John R. Henry, which is in the following words and figures: "The State of Alabama, Lauderdale county. Commissioners' Court, Special Term, 4th April, 1849. Ordered by the Court, that John R. Henry be allowed two thousand two hundred and ten dollars, the balance due him on final settlement of his contract for building Shoal Creek Bridge, with interest thereon from the 1st day of December, 1848. No. 596. $2,210. W. T. HAWKINS, *Clerk*."

On which was endorsed, "No. 980. The treasurer of Lau-

derdale county will pay the within to John Wightman, for value received. JOHN R. HENRY."

The other evidence in the case shows, that this claim was presented to one Joseph Bigger, who was then treasurer of Lauderdale county, and was by him registered in a book kept by him for the purpose; that after the death of Bigger, the defendant was appointed treasurer, to whom the plaintiff presented his claim for payment, which was refused. It was also proved that the defendant had paid several thousand dollars of claims against the county, which had been presented and registered after that of the plaintiff, and that the defendant had had ample means in his hands to have paid the claim, if he had paid the claims against the county in the order of their registration.

On this proof, the court below charged the jury, "that if they believed that the claim, now the foundation of the plaintiff's motion, was audited and allowed at a special term, held by the Judge of the County Court, and Commissioners of Revenue and Roads of the county of Lauderdale, and not at one of the regular terms held at the times appointed by law, the plaintiff in this motion cannot recover."

To this charge of the court the plaintiff excepted, and assigns it for error in this court.

ORMOND & NICOLSON, for plaintiff in error.

We contend first: There is nothing in the act creating the court which prevents it from holding a special term.

The first section of the act (Clay's Dig. 149) gives this court the jurisdiction over roads, bridges and ferries, the levying of the county tax, and the appointment of county officers; and the second section declares that for the performance of the duties enjoined, the court shall meet at certain designated periods, and the next section gives them power to make appropriations for county purposes, and gives them control over the funds of the county.

This was a case of that kind: it was the auditing an account for building a bridge, and directing its payment. There does not appear to be any good reason why the court might not hold a special term for the performance of any county business than that enumerated in the first section, and great

inconvenience might result. For instance, the condition of treasurer's bond is, that from time to time, and at *all times when required*, he shall render a true account to the Commissioners' Court. Suppose his securities be about to fail, and he be squandering the county funds, cannot the court have a right to call upon him immediately for new security and a settlement? Surely they could under the act of 1848, (Sess. Act, p. 102) which gives them the power to hold a court whenever in their opinion the public *convenience requires it.*

Again: The act of 1806 (Clay's Dig. 142) which prescribes the manner of auditing, registering and paying claims against the county, was passed long anterior to the existence of the Commissioners' Court, and although the Commissioners' Court succeeded to the duties which the act of 1806 imposed on the old justices and County Court, no argument can be drawn from the use of the words, "*in term time*," because that language had no reference to the Commissioners' Court as now constituted. (See the original act, Aikin's & Toulmin's Dig.) All that the act meant to declare was, that the powers should be exercised by the justices sitting as a court, the opposite of "*term time*," not being as contended *regular*, as opposed to *special* terms, but action in open court, as opposed to action by the members *not sitting* as a court. We insist, therefore, that there is nothing in the act referred to which prohibits the court from holding a session whenever the wants or the business of the county demanded it, even as to subjects enumerated in the first section. But if that were not so, the control given them over the county treasury in the third section is an independent grant of power, in the exercise of which they are not confined to the terms prescribed by the first section, and if the act of 1806 is to exert any control over the subject, it merely confines the court in the exercise of the powers to "*term* time," viz: not in vacation.

But independent of this criticism on the two acts mentioned, an act was passed in 1848, by which the commissioners were authorized to change the time of holding this court, whenever, in their judgment, the *public convenience* required it. (Acts '48, p. 102, § 6.) Surely, then, when they do hold a court for the transaction of business, and audit and pass an account by which a right is vested, it must be held that

the court was convened because the public convenience required it, of which convenience they are made the exclusive judges. The public convenience would be advanced by increasing the number of terms in a year, not by merely changing the times of holding the stated terms.

As the court unquestionably had jurisdiction of the subject matter, its action is not void, but voidable merely, and cannot be impeached collaterally by any one, especially not by a stranger to the proceeding, as the county treasurer is. The effect of the order of the court was, a direction to the treasurer to pay the money, and the claim was presented, numbered, placed on the book of the treasurer, and a sufficient fund is shown from which it might have been paid. It does not then lie in the treasurer's mouth to question the power of his principal, the Commissioners' Court. 7 Ala. 85; 15 Ala. 134; 1 Rich. 335; 1 Con. 1; 1 Kelly, 271; 2 How. U. S. 338, *et seq.*

R. W. Walker, *contra.*

1. The Commissioners' Court is a court of special and limited jurisdiction: and it is a general rule, that nothing will be intended in favor of the jurisdiction of such a court, but every thing necessary to sustain it must affirmatively appear on the face of the record. 18 Ala. Rep. 694; 18 Ala. Rep. 482 (487); 16 Verm. 246; 3 Phil. Ev. 1013, and cases cited; 1 U. S. D. 629, and cases cited; 3 Phil. Ev. 987, 1021, 1104; 15 Ala. Rep. 134.

2. If there is a want of jurisdiction, the judgment or proceedings are *coram non judice* and void. They may be impeached collaterally in any other court, where any right or benefit is sought to be taken under them. 16 Ala. 280; 6 Porter, 219; 10 Peters, 449; 13 ib., 511; 1 ib. 340; 3 Howard U. S. 762; 11 Wend. 655; 3 Phil. Ev. 990, and authorities; 2 Suppl. U. S. D. 230, 249, and cases cited; 6 Wheaton, 119; 8 Sm. & M. 85, 421, 505; 5 Hill, 568; 1 Denio, 158; 6 Howard Miss. 168.

3. If a court of limited jurisdiction does not proceed according to the mode prescribed by the statute, its acts are nullities. 5. Black. 462; 3 Phil. Ev. 987–8–9–90, 995–6; 1 Bailey, 457, and authorities *supra.*

4. Jurisdiction is the power to hear and determine the cause; and there is no jurisdiction, either when the *subject-matter* of the cause is one of which the court has not legal cognizance, or when the *person* proceeded against is not subject to its control, or when the *process* by which the cause has been instituted is one which the court cannot issue, or when the *mode of proceeding* prescribed by law has not been pursued, or when the court is held at a *time* or *place* not authorized by law. 3 Phil. Ev. 993, 997, 1000, 1002, 1003; 2 How. U. S. R. 338; 3 How. U. S. 762.

5. Where a court is held at a *time* or *place* not authorized by law, its proceedings are *coram non judice* and void. 1 Ala. Rep. 351; 2 Pike, 229 (250–1–2); 27 Maine, 114; 1 Scammon, 555; 2 ib. 227; 2 ib. 303; 3 Blackf. 501; 2 Cowen, 445; 1 U. S. D. 631, § 95; 8 Term R. 431; Marshalsea case, 10 Coke R. 76; 3 Phil. Ev. 1003, 1007; 2 Blackf. 305, 306; 3 H. & J. 560; 7 ib. 79; 1 G. & J. 184; 6 C. & P. 337; 6 Cowen, 456, 463.

The case of Lewis v. Intendant of Gainesville, 7 Ala. Rep. 85, is not in point. There the proceeding was had at an *adjourned* term, not a *special* one, and the record recited that fact; *here the record shows affirmatively* that the *order was made at a special term, and that there was no evidence that such special term had been previously ordered.* In the case in 7 Ala. Rep. 85, the order was really made at a *regular* term; for an *adjourned* term is part of the regular term. Every court has the power to adjourn its sittings, and an adjourned session is a mere continuance of the regular term from which the adjournment was made. 2 Pike, 229, 250; 5 Mass. 435; 6 Wheat. 106.

But a *special* term is not part of the regular term. It is entirely distinct and substantive; and the power to hold a *special* term must be given by statute. 7 Yerger, 365; 2 Pike, 229, 250; 6 Yerger, 395; 2 Scammon, 303; 13 Sm. & M. 153, 156.

Whenever *special* terms, as distinct from the regular ones, have been held by the Commissioners' Courts, they have been authorized by *special* acts. Acts of '43, 137, 156; Acts of '45, 14, 63.

6. The Act of '48, Acts, p. 103, has no application. It

simply authorizes the Commissioners to *change* the *time* of holding their court, *i. e.* to change the *time* when by preexisting law they were required to hold their court. The whole object and effect of the act were, to authorize them to alter the time of holding their regular terms.

LIGON, J.—The charge of the court below, which is here assigned for error, proceeds upon the assumption, that the *special* term of the Court of Commissioners of Revenue and Roads for the county of Lauderdale, at which the claim of Henry was audited and allowed, was held without authority of law, and consequently its acts were *coram non judice* and void.

If the Court of Commissioners of Revenue and Roads, at the session at which this claim was audited and allowed, was clothed with all the attributes necessary to give it jurisdiction, the manner of its exercise is certainly regular in this instance.

Jurisdiction, when applied to courts, is defined to be the power to hear and determine the cause. But, before a court of limited jurisdiction will be sustained in its action, even in cases in which, by the law creating it, it had full power to hear and determine, it must be shown by the record, that every preliminary required by law has been complied with before it acted. 18 Ala. Rep. 694, and authorities there cited. That the Court of Commissioners of Revenue and Roads is the creature of the statute, and one of limited authority or jurisdiction, has been several times ruled by this court. 18 Ala. Rep. 694; ib. 482. One essential ingredient to the exercise of jurisdiction by any court, for the sessions of which a time is appointed by law, is, that it act within *the time* prescribed, and should it fail to do so, or presume to act at another and a different time, such acts are absolutely void. Cullum v. Casey, 1 Ala. Rep. 351; 27 Maine Rep. 114; 2 Scammon, 227; 1 ib. 555; 3 Blackf. 501. In the case before us, the claim on which the suit is founded, appears to have been audited and allowed, at a "*special term*" of Commissioners' Court, held on the 4th of April, 1849; and the question arises, had that court authority of law to hold such a session? It is entitled in the record, a "special term," as contra-distinguished from

a *regular* or *adjourned* term of the court. By the former, we understand a term appointed by the presiding officer or officers, held at an unusual time, for the transaction of some particular business. By the latter is meant, a term begun at the time appointed by law, and continued, at the discretion of the court, to such time as it may appoint, consistent with law. We have sought our statutes in vain, for authority in the Courts of Commissioners of Revenue and Roads, to hold *special* terms of their courts, except for fixed purposes named in the acts giving such authority. By the 28th section of the act of 1821, four Commissioners of Revenue and Roads are directed to be elected for each county, two of whom, with the judge of the County, (now Probate) Court, shall constitute a court, whose powers and duties are defined. Clay's Digest, 149, § 1. By the first section of the same act, as amended by the act of 1824, the terms of these courts are appointed to be held on the first Mondays in December, February, and May, and third Monday in August. Clay's Dig. 149, § 2. In none of the acts concerning this court, before the act of 1848, is any other direction given for the holding of its terms, except, in the revenue laws of the State, a special term has sometimes been directed to be held, for the sole purpose of levying the county tax, but from these, no authority to hold a term like the one we are now considering, can possibly be derived.

But it is contended, that by the sixth section of the act of 1848, entitled "an act to reform the evils arising from local legislation," (Sess. Acts, 1848, p. 100), it was intended to confer the power of holding special terms upon the Commissioners of Revenue and Roads, and that in their capacity as such, without assembling as a court, on any day regularly appointed by law for that purpose, they may appoint the time for holding their courts, and such appointments will be good, and the terms held pursuant to it will be both legal and regular. Several reasons, too important to be disregarded, forbid us from adopting this construction of that act.

In the first place, before the passage of that act, the General Assembly was repeatedly annoyed with applications from the several counties in the State, for acts to authorize the Commissioners' Courts of some one county to hold one or

more of its regular terms at periods of time different from those fixed by the general law. The acts of that body, before 1848, and even during the session of that year, show that such applications were granted, and laws passed pursuant to them. The leading object, then, of the General Assembly, in the passage of the act referred to, was correctly set forth in its caption, and must be held to be, to give authority to the Commissioners' Court, while sitting as such, to order its regular terms to be held at times different from those fixed by the act of 1824, above referred to. This would free the General Assembly from the necessity, in future, of passing acts for this purpose.

That it was not intended to confer the power to appoint a term of their court on the Commissioners of Revenue and Roads, in their individual capacity, we think, will sufficiently appear, from an examination of the several sections of the act itself. By the fifth section of the act, power is given to "the Commissioners of Revenue and Roads" whenever it may be necessary to levy a tax for county purposes, to levy it. The same careless phraseology is employed in the sixth section, which confers the power to alter the terms of their court, when the public convenience may require. The General Assembly could not have intended to clothe the Commissioners, in their individual capacity, with the powers enumerated in the fifth section of the act, nor can we suppose they designed to employ the same phrase, in a different sense in the sixth section; in both places it should be understood as though it read, "the *Court* of Commissioners of Revenue and Roads," &c.

Our conclusion is, that the *special* term of the Commissioners' Court of Lauderdale county, at which the claim on which plaintiff's motion is founded was audited and allowed, was not held at a time authorized by law, and consequently its proceedings were *coram non judice*, and void.

2. Having seen that the proceedings of the court, at which the claim of the plaintiff was audited and allowed, were void for want of jurisdiction, it only remains to be seen whether the defendant could avail himself of it in a collateral proceeding. As far as our search has extended, the best authorities on the subject concur in saying, that a judgment *void* in one court, is not binding upon any other court, in which an in-

terest arising under it is sought to be enforced. If the proceedings were merely irregular or erroneous, and liable to be set aside on appeal or writ of error, the case would be different.

The cases of Davison and another v. Gill, (1 East. 64) and Welch v. Nash, (8 East. 394) were both actions of trespass *quare clausum fregit*, brought by the owners of land, against persons for shutting up an old, and opening a new, foot-path through the premises of the plaintiffs, and the defendants sought to justify by an order of the justices of the peace under the statute (13 Geo. 3, c. 78, § 19) which gave such justices jurisdiction over the subject matter, and pointed out the manner in which it should be called into action, and exercised; and in both these cases the court permitted the plaintiff to show that the orders, under which the defendants acted, were not made by the justices according to the requirements of the statute conferring the jurisdiction, but that they were such gross departures from it as to be void, and thus afforded the defendants no protection whatever. Void orders and judgments have been allowed to be impeached collaterally, when those who claimed rights under them have sought to enforce them, by the Supreme Court of the United States, in the case of Elliot *et al.* v. Piersol *et al.* (1 Peters, 341) in which that court employs this language: "When a court has jurisdiction, it has a right to decide every question which occurs in the cause: and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding on every other court. But if it act without authority, its judgment and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to reversal, in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered in law as trespassers. This distinction runs through all the cases on the subject; and it proves, that the jurisdiction of any court exercising authority over a subject, may be inquired into in every court, when the proceedings of the former are relied on and brought before the latter, by the party claiming the benefit of such proceedings."

Such is the rule laid down by the Supreme Court of the United States, and we believe it to be the true one, especially

in relation to courts of limited jurisdiction. See also 10 Peters, 449; 13 ib. 511; 6 Wheat. 119; 3 Howard U. S. Rep. 762. It has been recognized and acted upon in New York, 5 Hill, 568; 11 Wend. 652; 1 Denio, 158: in Mississippi, 6 How. Miss. Rep. 106; 8 Smedes & Marshall, 521 and 505: in Vermont, 16 Ver. 251: in Illinois, 4 Scam. 364: and in Arkansas, 5 Pike, 424.

In the case of Cole, Adm'r, v. Connolly, 16 Ala. Rep. 280, this court quotes approvingly the language of Mr. Justice Baldwin, in the case referred to in 10 Peters, 449, which is at least as strong as that which we have quoted from Mr. Justice Trimble, in the one cited from 1 Peters, 341.

The decision of this court, in the case of Lewis v. the Intendant and Town Council of Gainesville, (17 Ala. Rep. 85) we hold to be proper, upon the facts of that case. But we are constrained to dissent from the strong language employed by the Judge who delivered the opinion of the court, especially from that portion of it in which he repudiates the right of collaterally inquiring into the legality of the time of holding the session of the court at which the order was made, the validity of which is called in question collaterally, in a proceeding by which the party to the void order seeks a benefit under it. But, we repeat, this point did not necessarily arise in that case, and what is said upon it must be regarded as a dictum. The order there sought to be impeached, purported to have been made at an "adjourned term" of the Commissioners' Court, and it was correctly remarked in that case, that "it is not necessary to validate the acts of the Commissioners' Court, that it should have adjourned from day to day, down to the time of making the order; if it met at the proper time, an adjournment to any day before the commencement of the next term, would be sufficient, as it is authorized to sit until the business was completed." This was quite enough to justify the conclusion of the court in that case.

There is no error in the record, and the judgment must be affirmed.

McGUIRE *vs.* SHELBY.

1. A distributee of an estate is *prima facie* an incompetent witness, when his testimony tends to increase the funds of the estate, and the presumption of interest is not removed by proof to the court that the estate had been declared insolvent before the witness was sworn, the party against whom the evidence is offered being neither the personal representative, nor a creditor of the estate.
2. The possession of the mortgagee under the mortgage before the law day is not adverse to the mortgagor.
3. In detinue, the defendant cannot show that the plaintiff's possession of the property sued for was acquired by fraud, without connecting such fraud with his own title.

ERROR to the Circuit Court of Talladega.
Tried before the Hon. E. Pickens.

This was an action of detinue, brought by Shelby against McGuire, to recover a slave. The evidence tended to show, that the slave was originally the property of one Thomas L. Holley, who, on the 6th October, 1842, executed an assignment conveying said slave and other property to said Shelby, for the benefit of his creditors; that said Holley had, on the 13th June, 1842, executed a mortgage on said slave to one Johnson, with a power of sale on the first day of November next thereafter, if the mortgage debt was not paid by that time, under which the slave in controversy went into the possession of the mortgagee, and was sold under the mortgage, in 1843, to House & Lyle, who bought her at the request of said Holley, and with the understanding that he should be permitted to redeem her; that she was afterwards redeemed by one Adams, with money most of which belonged to Holley, and the money paid by Adams towards her redemption was subsequently repaid to him by said Holley; that the bill of sale was taken in the name of Holley, by an understanding between Holley and Adams, for the purpose of avoiding the levy of execution on the slave; that in December, 1843, after the redemption, the slave went into the possession of Shelby, by the consent of Adams and Holley, and in March, 1844, Adams proposed to Shelby to purchase from him a number of slaves, including the one sued for, which Shelby assented to, on condition that Adams would execute to him,

for the purchase money, a mortgage on all the slaves intended to be included in the purchase; that Adams got possession of all the slaves, but failed to execute the mortgage, whereupon Shelby sued for and recovered all of them, except the one sued for in this action. McGuire, the defendant below, claimed under Adams, the slave having been placed in his possession as security for a debt of Adams' which he was bound for. On the trial of the case, the defendant in error offered the deposition of Bezant Holley, which tended to prove that the slave, after being bid off by House & Lyle, was redeemed by Thomas L. Holley—the taking of the bill of sale to Adams for the purpose as stated, the return of the slave into the possession of Thomas L. Holley; that she remained at his plantation for some time, when she went into the possession of Shelby. The answers of this witness also conduced to prove the facts before stated, as to the trade between Shelby and Adams for the slaves, and the conditions of the same in relation to the execution of the mortgage, and that he fraudulently obtained possession of the slave in controversy. It was shown by proof to the court, that this witness was the son of Thomas L. Holley, who was dead; and upon these facts being shown, the plaintiff in error moved to reject his deposition, which motion was overruled, on its being shown to the court that, before the deposition had been taken, the estate of said Thomas L. Holley had been reported and declared insolvent by the proper court. There was also evidence tending to show that the property in the deed of assignment, with the exception of the slave in controversy, was sold by the defendant in error, and purchased by one Griffin for less than its value, and that said Griffin has, without paying or securing the purchase money, re-sold it to defendant in error, on his agreeing to pay all the debts enumerated in the assignment, for some of which said Griffin was bound; that said debts were not all genuine, and that the amount of debts really due at the sale of the property was $700, and a small balance to the bank. The property sold under the assignment was nine negroes, worth $3,400.

The court charged, that if the slave sued for was held adversely at the time the deed of assignment made by Thomas L. Holley to the defendant in error was executed, then he was

not entitled to recover; but if the slave was held by Johnson at that time under the mortgage from Holley to him, that such possession would not be adverse.

The plaintiff in error requested the court to charge:

1. That if Holley and Adams, with their joint funds, purchased the negro of House & Lyle, and to secure himself, Adams took the bill of sale in his own name, then Holley could not transfer the title without a reconveyance, so as to authorize a recovery.

2. That if the defendant in error claimed as trustee in the assignment, and had sold the property as such, with the exception of the slave sued for, and it was purchased by Griffin, who was bound for the debts proven to be genuine, and that Griffin sold the property so bought to the defendant in error, on the consideration that he was to pay the debts specified in the assignment, a recovery could not be had.

3. That the presumption being that the creditors had assented to the assignment, if afterwards the defendant in error, as trustee, sold the property, with the exception of the slave in controversy, and afterwards bought the same from the purchaser on an agreement to pay the debts in the assignment, a recovery could not be had.

4. That if the defendant in error, at such sale, as trustee, sold property enough under the assignment, exclusive of the slave sued for, in value sufficient to satisfy the debts, and took the slaves into his possession, and appropriated them to his own use, the purchaser neither paying nor securing the purchase money, and the defendant in error paying nothing to the purchaser, that a recovery could not be had.

Which several charges were refused.

The court gave several charges, which were excepted to, but it is not necessary, as the points raised on them are not decided by the court, to state them.

The overruling the motion to reject the deposition, the charges given, and the failure to charge as requested, are assigned for error in this court.

WHITE & PARSONS, for plaintiff in error.
RICE & MORGAN, *contra.*

GOLDTHWAITE, J.—The first question presented by

the record in this case, arises upon the objection made to the admissibility of the deposition of Bezant Holley. The action was brought by the defendant in error to recover a slave, and one of the grounds on which, as the record discloses, he based his right to a recovery was, a deed of assignment executed by one Thomas L. Holley, conveying to him in trust, for the benefit of his creditors, the slave in controversy, and other property. The objections in the court below against the admissibility of testimony, were founded on proof made to the court that the witness was the son of Thomas L. Holley, who was dead at the taking of the deposition; and if the action of the court below, in overruling the objections taken to the evidence, had been based upon this state of facts alone, it would clearly have been erroneous. Under the assignment, the assignor was entitled to the excess remaining after the application of the property conveyed to him to the discharge of the debts specified in it, and this would have rendered him incompetent as a witness. Stewart v. Fowler, 3 Ala. Rep. 629. The same reasons which rendered the assignor incompetent, would exclude a distributee of his estate, as the tendency of his evidence would be to increase a fund in which he would be entitled to participate.

It was proved, however, that the estate of Thomas L. Holley, before the testimony of the witness was taken, had been reported and declared insolvent by the proper court; and the decisions of this court in the cases of McKinney v. McKinney, 2 Stewart, 17, and Tatum v. Manning, 9 Ala. Rep. 144, are conclusive in establishing the rule, that where a witness is *prima facie* incompetent, from being interested in a fund which his testimony tends to increase, his interest may be disproved by showing that the fund can be productive of no benefit to the witness. Under the influence of this rule, the only question upon this point is, as to the conclusiveness and effect of the decree of insolvency, considered with reference to the purpose for which it was received; or in other words, does the decree of insolvency, considered as evidence only, rebut the presumption of interest arising from the position occupied by the witness in relation to the estate. Under the statute which regulates the proceedings upon insolvent estates, the personal representative of the deceased, and the

creditors of the estate, are the only parties; and whatever may be the real situation of the estate, the court is bound to declare it insolvent, whenever it is so reported by the personal representative in the mode required by the statute, unless the report is contested by a creditor. Clay's Dig. 192, §§ 2, 3, 4. No notice is required to be given, save to the creditors; no one but a creditor is allowed to contest; and indeed it is apparent, from the purport of all the statutes in relation to this subject, that the decree of insolvency was intended simply to declare the *status* or condition of the estate, as between the personal representative on the one part and the creditors on the other. Whatever may be its effect upon the estate itself, we are clear that as a matter of evidence, except as to the parties, and to sustain proceedings under it, it is a mere nullity. The distinction between the case of Tatum v. Manning, previously cited, and the case under consideration, is obvious. In the one, the evidence offered was to prove that the estate was in fact insolvent; in the other, that it had been reported and declared insolvent only. It is unnecessary to consider the question as to the competency of the witness, in the other aspect in which the plaintiff below presented his right to recover on the assignment. Conceding that his right to recover rested upon distinct and separate grounds, so long as he insisted on both, the incompetency of the witness on either would have been sufficient to exclude him. It follows that the court erred in the admission of the deposition objected to.

2. The possession of Johnson under the mortgage from Holley, was in subordination to the grantor, at least until the law day had passed, and could not be considered as adverse to him. Herbert v. Hanrick, 16 Ala. Rep. 581, and cases there cited.

3. Neither do we think the court erred in refusing the several charges as requested. The first, by the use of the term conveyance, asserts the proposition that the title to personal property could not pass by parol, and all the others are inconsistent with one of the positions occupied by the plaintiff in the court below, and growing out of the right to recover upon the previous possession of the slave in controversy, which the evidence tended to show had been recognized and

admitted by Adams. No proposition can be clearer on both principle and authority, than that when one is in possession of personal property, and another obtains it from him by fraud, it is no answer to a suit for such property, by the party thus deprived of possession, to show that it was fraudulently acquired by the plaintiff in said suit, without connecting such fraud with his own title. Dunklin v. Wilkins et al. 5 Ala. Rep. 199; Traylor v. Marshall, 11 Ala. Rep. 460. In this view of the case, the plaintiff in error, claiming through Adams, does not occupy a position which would authorize him to raise the questions sought to be presented by the several charges referred to, and they were therefore properly refused. The points decided will in all probability determine the case on a subsequent trial, and for that reason we deem it unnecessary to express an opinion on the other points presented by the record.

For the error of the court below in the admission of the testimony of the witness Holley, the judgment is reversed, and the cause remanded.

CLACK'S HEIRS *vs.* CLACK'S ADM'RS.

1. It is not ordinarily necessary that the record should show that the administrator made the affidavits required by law, in regard to the use of the money of the estate and the names of the heirs and legatees. They will be presumed to have been made, in the absence of an exception for the want of them.
2. When the record shows that there were minor heirs, it should also show that they were represented on the final settlement by a guardian, or guardian *ad litem;* and if it does not, the decree will be reversed on error.

ERROR to the Court of Probate of Marshall.

The writ of error in this case was sued out to reverse a final decree of the Court of Probate for the settlement and distribution of an estate. Three errors are assigned, viz:

1. That there were minor heirs, and that it does not appear by the record that they were represented on the settlement by a guardian, or guardian *ad litem.*

2. That the Court of Probate proceeded to a final settlement, without requiring the administrator to make the affidavit required by law, in regard to the use of the money of the estate.

3. That the court proceeded to final settlement without requiring the administrator to make the affidavit required by law, in regard to the names of the heirs and legatees of the estate.

WYETH, for plaintiffs in error.

No counsel for defendants.

PHELAN, J.—It does not appear by the record, that any such affidavits as those to which the second and third assignments relate were filed by the administrator, nor is it necessary that it should. If the administrator had neglected, or refused to make the oath, in regard to the use of the money of the estate, or to file "a list of the heirs and legatees" of the estate on oath, as required, it is to be presumed that an exception would have been taken, and the matter would then properly have appeared on the record. It is not necessary ordinarily, that these things should appear by the record. They will be presumed to have been done, in the absence of an exception for the want of them. The case of Eddings et al. v. Long et al. (10 Ala. 203) is decisive of this matter.

The first assignment of error is good, as was decided by this court, at the June Term, 1851, in the case of Devor's Heirs v. Devor's Administrator. Where it appears from the record, that there are minors, it must also appear that they were represented on the final settlement by a guardian, or guardian *ad litem;* and if it does not, it will be error.

For this error, the decree of the court below is reversed, and the cause remanded.

COCHRAN *vs.* RISON.

1. New matter, which has arisen or been discovered after publication of testimony has passed in the original suit, may be brought forward by bill of review.
2. The objection that the original decree has not been obeyed or performed, cannot be raised by a general demurrer to a bill of review, filed for the purpose of annulling or reversing it. The objection can go only to the propriety of filing the bill, and not to the equity of it when filed.
3. The chancellor has the power, under the statute of this State, to direct the decree on the original bill to be stayed in such manner as he may deem advisable; or he may allow the bill of review to be filed, and let the complainant proceed with the execution of the original decree.
4. An agreement entered into between the complainant and one of the defendants after publication of testimony has passed, whereby the complainant, for a valuable consideration paid him by said defendant, agrees to proceed no further against him in the original suit, and reserves his right to proceed against the other defendant, is good matter for a bill of review, and entitles said defendant to relief against the original decree.

ERROR to the Chancery Court of Madison.
Tried before the Hon. D. G. Ligon.

The bill in this case alleges, that in the year 1843, the plaintiff in error filed his original bill in equity, setting forth a partnership between the plaintiff in error, James M. Cochran, Archibald Rison, Joseph Caruthers and James M. Martin, praying that an account might be had of the partnership transactions, with the view of ascertaining how much the firm was indebted to him, and for a decree in his favor for the amount that might be ascertained to be due to him. It is also alleged that the defendant in error, the complainant below, and the other members of the firm answered the bill, after which the bill was amended, and that they answered the amended bill. It is further alleged that depositions were taken, and an order of reference was made to state the accounts between the parties; that a report was made by the master to which exceptions were filed, and that the exceptions were set down to be heard by the chancellor. It is also alleged, that after the report was made, and the exceptions thereto filed, and only a few days before the final hearing, the said Cochran, by his agreement in writing, in consideration of $400 paid to him by the complainant, bound himself to proceed no further in said

suit against the complainant, for any part of the liability sought to be enforced by said bill; but that the agreement stipulated that Cochran should reserve his right to proceed against the other defendants to said suit, as if no agreement had been made, which agreement was left in the possession of James Robinson, the solicitor of said Cochran; that on the final hearing of the cause, upon the exceptions to the master's report, this agreement was proved and filed amongst the papers, complainant believing at the time that he would obtain the full benefit of this agreement upon the final decree; but that the decree was rendered, without regard to this agreement, against this complainant, as well as against his copartners. It is also alleged that, immediately after the adjournment of Court, Cochran obtained an execution, and is now seeking to enforce the collection of the entire amount of the decree out of the complainant. The agreement is set out, as an exhibit to the bill, as well as the decree rendered in favor of Cochran upon his bill, from which it appears that Cochran recovered against Martin individually $285 $\frac{57}{100}$, and against this complainant and Caruthers, jointly, the sum of $2262 $\frac{68}{100}$. The bill prays that the decree rendered on the original bill may be reviewed, that it be reversed, and for nought held, and the complainant placed in the same situation as he would have been, had it never been rendered. It also prayed an injunction, restraining the execution of the decree.

The answer of Cochran, who alone was made a party to the bill, admits the execution of the agreement, and states that it was further agreed that this agreement should be kept secret from Caruthers, the other defendant, but that the complainant had violated this part of the agreement; and in effect also admits that he is attempting to coerce the entire amount of the decree out of the complainant. The answer concludes with a demurrer to the bill, and several causes of demurrer are assigned:

1st. That there is no equity in the bill;

2d. That it is not shown that there is any error apparent on the face of the decree;

3d. That the bill does not disclose any new fact discovered since the decree;

4th. That the agreement cannot operate as a discharge of

the whole debt; besides several other grounds, not necessary to notice.

The chancellor granted the prayer of the bill, and vacated the decree as to the complainant.

JAMES ROBINSON, for plaintiff in error.

Bills of review may be brought for errors apparent upon the face of the decree, and for facts discovered too late to be made available on the first hearing. Story's Equity Plead. 424, §§ 404, 405; 3 Daniel's Ch. Plead. & Pr. 1727.

There is no pretext for saying this bill was properly brought upon the first ground; for there is not only no error upon the face of the decree, but there is no error in it for which this court would reverse.

If the paper offered was worth any thing, its worth should have been asserted in a different mode. It was not put in issue, and therefore not admissible evidence for any purpose.

Then upon the second ground: Was this fact discovered after the decree, or so lately before it that defendant had no opportunity to avail himself of it? The paper relied on was made on the 7th November, 1848, and the succeeding term was on the first Monday in December after.

Now the question is, was there any way or mode by which the defendant could have put this fact of payment in issue.

It has been held by some, that this might be put in issue by a cross bill. 3 Daniel's Ch. Plead. & Pr. 1743; Story's Equity Plead. 414, § 392.

From this, it seems it could have been accomplished by cross bill.

By our statute, and decisions founded upon it, any part of the pleadings at any stage of the cause may be amended. Clay's Digest, 351, § 27; 9 Ala. 547.

So that it appears, that there were two ways in which he could easily have put this fact in issue. If there was a possibility of using the new fact in the first case, then such a bill will not lie. 3 Daniel's Ch. Plead. & Pr. 1727.

2. But were it even put in issue, it would not avail, for the agreement was without consideration. A restoration of a part of a debt is no consideration for a promise to suspend the collection of the balance. Leverett & Co. v. Bates, 6 Ala.

482; Wilson v. Bank of Orleans, 9 Ala. 847; 7 Johns. R. 209; 2 Cow. 139; 12 Johns. R. 426.

3. This bill is predicated upon new facts, and should, therefore, have been filed by leave of the Court first obtained therefor. 3 Daniel's Ch. Plead. & Pr. 1732; Story's Equity Pl. 430, § 412.

This leave not having been obtained in this case, the bill must be dismissed.

R. C. Brickell and E. R. Wallace, *contra.*

1. If a party seeks to reverse a decree which has been signed and enrolled, upon error apparent, or *on new facts*, or facts discovered since publication passed in the original cause, he must file a bill of review. 3 Daniel's Ch. Pr. 1724.

2. Matter discovered after a decree has been rendered, although not capable of being used as evidence of anything, which was previously in issue in the original cause, but constituting an entirely new issue, may yet be the subject of a bill of review, or of a supplemental bill in the nature of a bill of review. Story's Eq. Pl. § 416.

3. If a bill of review is grounded on new matter, *it must be new and material matter, pressing upon the decree, which has arisen, or been discovered* at too late a period to have been made available by proper diligence on the former hearing. Caller v. Shields *et al.* 2 Stew. & Port. 417; Williams v. Murphy, 1 Porter, 40; Story's Eq. Pl. § 412.

4. The ordinance of Lord Bacon respecting bills of review, is "new matter, which hath arisen in time after the decree, and not any new proof, which might have been used, when the decree was made." Story's Eq. Pl. §§ 404, 424.

5. It is sufficient, if the new matter was not discovered until after publication. Caller v. Shields, *supra;* Story's Eq. Pl. § 415.

6. The reason of the rule authorizing bills of review, upon discovery of new matter, after the time when it could have been used in the original suit, applies to this case. It certainly can make no difference, that the fact did not exist prior to the publication of testimony in the original cause. It is not the time when the fact occurred, that is material in the consideration of this question. The remedy by bill of review is

given, because, when the party is in a condition to use the fact, the original cause has passed the stage when testimony of the fact could be introduced.

7. A cross bill could not have been filed in this case. A cross bill must be filed before publication passes in the original cause, unless the plaintiff in the cross bill will go to trial on the proof already published. Governeur v. Elmendorf, 4 John. Ch. Rep. 351. Story's Eq. Pl. 426, § 395.

8. An amendment of the answer would not have been available. Facts occurring subsequently to the filing of the original answer, cannot, with propriety, be put in issue by an amended answer. Story's Eq. Pl. 867, § 903. See, also, McKinley v. Irvine, 13 Ala. 681.

9. This bill may, however, be sustained as a bill impeaching the decree for fraud. Bills of this sort are original bills, in the nature of a bill of review. Story's Eq. Pl. §§ 426, 445.

10. Where a decree has been obtained by fraud and imposition, the court will restore the parties to their former situation, whatever their rights may be. Story's Eq. Pl. §§ 426, 446. Of the fraud, in this case, there can be no doubt. Cochran, by his agreement, stipulates, "not to proceed any further against Rison." He discharges him from all liability, and in effect, promises to dismiss his suit as to Rison.

11. A bill, in the nature of a bill of review, impeaching a decree for fraud, may be filed without leave of the court. Story's Eq. Pl. §§ 426, 446.

12. Our statute abolishes the rule of the English Chancery Court, requiring bills of review, grounded on new matter, to be filed only by leave of the court. Clay's Dig. 350, § 30. By that statute, the chancellor is authorized, when a bill praying a review of proceedings, in which a decree shall have been pronounced, is presented, to make an order staying proceedings, &c., or to refuse a stay of the proceedings. The English rule proceeds upon the ground that there may be cases where, although the facts, if admitted, would change the decree, yet the court, looking to all the circumstances of the case, may deem it unadvisable to permit the bill to be filed; therefore, the granting of such a bill is not a matter of right, but rests in the sound discretion of the court. Story's Eq. Pl. §417. Our statute proceeds on the same ground, and dis-

penses with the necessity of procuring leave, by authorizing the chancellor, where such a bill is presented, to stay proceedings. As to the effect of this statute, P. & M. Bank v. Dundas, 10 Ala. 661. But if wrong in this position, it is too late for the plaintiff in error to make this objection now. Having without objection answered the bill, and proceeded to trial in the court below, this court will not entertain the objection. Walker *et al.* v. Hallett, 1 Ala. 579; Holman v. Bk. of Norfolk, 12 Ala. 369.

DARGAN, C. J.—No question has been made as respects the parties to this bill, neither in this court, nor in the court below; and we will therefore pass to the consideration of such questions as grow out of the assignments of error.

1st. Does the bill set forth such matter as will warrant a bill of review? The main ground on which it is filed is the written agreement, by which the plaintiff in error stipulated that, in consideration of $400 paid by the complainant to him, he would proceed no further in the original suit against this complainant to coerce payment from him of the liability sought to be enforced by the original bill, but reserved to himself the right to proceed against his co-partner.

This agreement was entered into, not only after publication had passed in the original cause, but after a reference had been made to the master, and he had prepared his report, to which exceptions had been filed, and only a few days before the cause was to be heard on the report of the master. As the cause then stood, this agreement could not have been brought before the court at the final hearing, and unless it can be brought forward by bill of review, the complainant can derive no benefit from it. I think it clear, that it forms the proper subject matter for a bill of review. The rule is, that if the new matter has arisen, or been discovered, after publication has passed, it may be brought forward by way of bill of review. Story's Eq. Pl. § 413; Livingston v. Hubbs, 3 John. Ch. R. 124; Dexter v. Arnold, 5 Mason, 303.

2d. It may also be objected, that the original decree sought to be annulled and reversed has not been obeyed and performed by the complainant. But this objection could not be raised by a general demurrer, even in England, where the gen-

eral rule was, that the decree must be performed, before a bill of review could be allowed. This, however, was but a general rule, and was often dispensed with. Daniel's Ch. Prac. Vol. 3, 1726. And in the case of Savill v. Darrey, (1 Chan. Cases, 42) the objection being taken after the bill was filed, the chancellor allowed the complainant to give security for the payment of the sum awarded by the original decree, and to proceed with the cause. This shows, that if the objection had been made in the court below, the bill itself would not have been considered defective, but that the complainant might have been allowed to give security to perform the original decree, and then to have proceeded. Indeed, this objection can go, only, to the propriety of filing the bill, and not to the equity of the bill when filed.

But, independent of this, under our statute, the chancellor has the right to direct the decree on the original bill to be staid in such manner as he may deem advisable, or he may allow the bill to be filed, and let the complainant proceed with the execution of the decree in the original cause, (Clay's Digest, 350); and in the case at bar, by a restraining order, he enjoined the execution of the original decree. Had the objection, therefore, been made in a proper manner, and at the proper time, it could not have prevailed; but it is self-evident, that it could not be successfully urged in this court, by means of a general demurrer to the bill.

The answer admits all the material allegations of the bill, and the sole question, therefore, is, whether the bill warrants the decree that was rendered. Without undertaking to say what influence this agreement would have, between the plaintiff in error and Joseph Caruthers, the copartner of the complainant, we think it clear, that it is binding, as between the complainant and defendant. There was neither fraud nor misrepresentation in its execution, and Cochran had a full knowledge of the condition of his original suit at the time he entered into the contract. It therefore binds him, and the chancellor did not err in the decree that he rendered.

LIGON, J. having been the chancellor who pronounced the decree in the court below, did not sit in this cause.

CLARKE *vs.* PRATT.

1. In an action of debt upon a judgment rendered in Mississippi, it is error to render judgment final by *nil dicit*, without the intervention of a jury, for the amount of the debt and eight per cent. interest thereon as damages.
2. The court cannot take judicial notice of the rate of interest in a sister State, from the table of interest prepared by the Secretary of State and appended to the acts of the Legislature, as required by the act of 1848. The rate of interest must be ascertained by a jury, and the table appended to the acts is only *prima facie* evidence, which may be rebutted by other proof.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. John Bragg.

DOUGLASS SMITH, for plaintiff in error.

1. It was error to take judgment by default, and compute the damages (in suit upon note made in Mississippi) without proof of the rate of interest of the State of Mississippi. Dunn v. Clement, 2 Ala. Rep. 392; Evans v. Clarke, 1 Port. 388; Evans v. Erwin et al. 1 Port. 390.

The judgment in such case must be reversed. It is not such a clerical error as can be corrected by reducing the judgment to the amount of principal due on the note. Evans v. Erwin & Dunlap, 1 Port. 390.

In debt upon a foreign judgment, in the absence of a plea, the case ought to be submitted to a jury, upon an inquiry of damages. Murray v. Cone, 8 Port. 250.

Under the issue of *nul tiel* record, the court will not give the interest of the sister State upon such judgment. The rate and the amount of interest must be found by a jury. Hunt & Condry v. Mayfield, 2 Stew. 124.

The act of 1848, p. 80, only makes the table prepared by the Secretary of State *prima facie* evidence to prove the rate of interest. See this statute construed in the case of the Mobile and Cedar Point Railroad Company v. Talman & Ralstons, 15 Ala. Rep. 493.

Where a debt is ascertained by a writing, the judgment by default, whatever may be the sum, is final; but where it is not, the damages must be ascertained by a jury. Ken-

non v. Henderson, 6 Ala. Rep. 132; Witherington v. Brantly, 18 Ala. 200. Judgment in last case is by *nil dicit.*

The necessity of proof of interest is shown by the fact, that the clerk calculated the interest at eight per cent., when the real rate of interest is six per cent. See How. & Hutch. Dig. 643. See for decisions in the State of Mississippi, to same effect as ours, Fretwell v. Dinsmore, Walk. Rep. 484; Henry v. Halsey, 5 S. & M. 573.

Wm. G. Jones, *contra.*

1. It is conceded that, by the decisions of this court, made prior to the passage of the act of 18th February, 1848, (sess. acts of 1848, p. 80,) our courts would not judicially know the rate of interest in our several sister States. This legal presumption of judicial ignorance, was one of those legal fictions which was, in nine cases out of ten, untrue in itself, and in practice, productive of unnecessary inconvenience and expense. It is submitted that it was to remedy this inconvenience that the statute above referred to was passed. The effect of that statute, with the table of the rates of interest published at the end of the session's acts, is, to give to the courts, and their ministerial officers, authentic information as to the rates of interest in other States. They now can know and notice this judicially. This being so, it was proper, under the provisions of the statute, Clay's Dig. 325 § 70, for the court, by its clerk, to compute the interest in this case. The interest was properly computed at eight per cent., that being the Mississippi rate of interest at the time the judgment was rendered in Mississippi. Sess. acts 1848, p. 460.

2. It is insisted that the statute of 1848 only makes the table *prima facie* evidence of the rates of interest. But it is not evidence to juries only. It is equally evidence to the courts and their officers. Would it not be evidence to one of our Probate Judges, in ascertaining the amount to be allowed on a note made payable in another State, and filed here as a claim against an insolvent estate? Certainly it would. And so too in a chancery court. And no sufficient reason is assigned why the Circuit Court should not also judicially act on it. It is the act of the court; the clerk merely acts ministerially in making the computation. If he adopts a wrong

rate, or makes an error in his calculation, the court should and would correct it.

CHILTON, J.—This was an action of debt upon a judgment rendered in the State of Mississippi. The Circuit Court proceeded to render judgment final by *nil dicit*, without the intervention of a jury, for the debt and eight per cent. interest as damages.

This was clearly erroneous. The interest depended upon the law of Mississippi as to the rate to be allowed, and proof of what that law was should have been made, before any amount by way of interest could be recovered. The act of 1848 (see pam. acts, p. 80,)makes the table to be prepared and appended by the Secretary of State to the acts, *prima facie* evidence of what the foreign interest was; but that evidence was not conclusive, and could have been controverted. Besides, it was evidence for the consideration of the jury, before whom the facts must be controverted, if disputed, and not for the court. In the case of Mobile and Cedar Point Railroad Company v. Talman & Ralstons, 15 Ala. Rep. 472–493, we had occasion to construe this act of 1848, and we there held that the court could not judicially know the rate of interest, from the table prepared by the Secretary; that it was only *prima facie* evidence, and liable to be rebutted or disproved, and as a corollary from that proposition, the defendant should have an opportunity of contesting it before the appropriate triers of the facts, the jury. That the Orphans' or Probate Court Judge may receive such evidence and decide upon it, does not aid the defendant in error as an argument, since the law applicable to the organization and proceeding of that court makes the judge, unless a jury is called, the trier of the facts.

The cases cited by the counsel for the plaintiff in error clearly show, that the rate of interest must be found by a jury, who, upon inquiry as to the damages, must assess the amount. 2 Stew. Rep. 124.

And as this defect is not cured by the act of 1848, the judgment must be reversed and the cause remanded.

MONTGOMERY MANUFACTURING COMPANY *vs.* THOMAS.

1. In a declaration on a written agreement containing several distinct stipulations to be performed by the defendant, some of which have been performed, it is not necessary that the breach assigned should negative the performance of the defendant's contract *in toto*, but it will be sufficient if it avers non-performance in any one particular, and shows that the plaintiff has a good cause of action.
2. When the declaration assigns a sufficent breach, and shows a good cause of action, unnecessary averments, which are added by way of inducing special damages, are mere surplusage, and furnish no ground for demurrer.

ERROR to the Circuit Court of Montgomery.

Tried before the Hon. George Goldthwaite.

The defendant in error brought an action of assumpsit in the court below, against the plaintiff in error, on a written agreement, the terms of which are substantially set forth in the first count of the declaration, and are these: That the plaintiff in error, being the owner of certain iron-works, employed the defendant to superintend them for the term of three years, at the rate of $1800 for the first year, $2000 for the second, and $2200 for the third, to be paid monthly if required, and an additional sum of $500 if the defendant in error should remain in the employment of the plaintiff in error for the term of three years, and faithfully perform his part of the contract; that defendant's employment was to commence from the date of his arrival in the city of Montgomery. It was further agreed, that the plaintiff should have the right to discharge the defendant from service, if he should at any time fail to perform the duties of his office as superintendent, or be found incompetent to the performance of said duties; that he was to enter on the discharge of his duties at as early a day as practicable, and that he should devote his whole time, talents, energy and ability to his said duties as aforesaid, and to the interest of the plaintiff; that his attention to his duties was to be such as a careful, prudent, industrious and energetic man would give to his own affairs. The declaration sets out particularly other parts of the agreement, which it is not necessary to note. The defendant avers

that under, and in pursuance of this agreement, he came to the city of Montgomery at as early a day as practicable, and entered into the employment of the plaintiff, and on the discharge of his duties, and did give such attention to his business as a prudent, industrious and energetic man would give to his own affairs, and did and performed all things on his part required to be done and performed, by said agreement, until the 6th day of May, 1851; that he has ever been ready and willing to perform, and offered to continue and perform his agreement, and remain in the employment of plaintiff until the expiration of three years from the date of the commencement of the performance of said agreement.

The breach assigned is, that the plaintiff would not and did not continue the defendant in his service, according to the terms of the agreement between them, for three years; but on the contrary, refused to suffer or permit the defendant to continue in said service and employment, and without any good and sufficient cause or reason, defendant not having failed to perform all or any of his said duties, and not having been found incompetent to such performance, discharged him from employment, and has from that time wholly neglected and refused to retain and employ him. "By means of which, he has lost and been deprived of all the wages, profits, and advantages, which he otherwise might, and would have derived and acquired, by being continued in the said service and employ of the said defendant, and the said plaintiff has been and is, by means of the premises, wholly unemployed; and has lost, and been deprived of a large sum of money, to-wit, five hundred dollars, for expenses incurred in removing from said city of Montgomery as aforesaid back again to said city of Boston," &c.

To this count in the declaration, the defendant below interposed a general demurrer, which was overruled by the court.

The judgment of the court below, in overruling the demurrer, is here assigned for error.

Harris and Semple, for plaintiff in error.

1. All damages must be the result of the injury complained of, and the natural and proximate consequence of it. 2

Greenl. on Ev. p. 245 § 254; Lib. Ed. p. 209 § 254; ib. p. 258 § 256, Lib. Ed.; 2 Greenl. Lib. Ed. 210 § 256.

2. In an action to recover damages for the breach of a contract to serve for a limited time, the measure of damages is the injury sustained up to the time of the trial, when the suit is brought before the expiration of the term of service. Martin v. Everett, 11 Ala. Rep. 375; Davis v. Ayres, 9 Ala. Rep. 294.

3. An allegation of the character in which the plaintiff sues, or of his title to damages, though sometimes superfluous, is generally descriptive in its nature, and requires proof. 1 Greenl. on Ev. 66 § 58.

4. The declaration is defective, because it does not aver a performance of the various duties which the defendant undertook to perform during the time he remained in the employment of the plaintiff in error. The general averment of performance is not sufficient. He must set out the manner of the performance, and show that during the time he was in the employment of defendant below, he performed the agreement on the part of the defendant in error to be performed. 1 Chit. on Pl. p. top 320, mar. 321, 214. There is no averment of the capacity of the defendant in error to perform his agreement.

5. The allegation of special damages in the declaration, entitled the defendant in error to give evidence of these damages alleged in the declaration, and of consequence would have authorized the jury to find those damages if proven.

WATTS, JUDGE & JACKSON, *contra.*

1. The declaration is sufficient. It contains a good and sufficient cause of action; and since the abolishment of special demurrers, that it is all that is requisite.

2. There is a sufficient averment of performance on the part and behalf of the plaintiff below, to entitle him to recover, if discharged without cause; and there is a good and sufficient averment of his discharge without cause.

3. The particular grounds, or causes of damage, set forth in the conclusion of the declaration, whether legitimate or not, are immaterial: if illegitimate, they may be rejected as surplusage.

4. If any ground of damage, illegitimate and improper, had been insisted upon in the court below, and decided adversely to plaintiff in error, he might have excepted to the ruling of the court thereon, and had a proper correction made in this court.

LIGON, J.—In the declaration before us, the plaintiff below has set out the agreement between himself and the defendant at length, averring all its stipulations; but in assigning breaches, has confined himself to a violation and non-performance of one part of the agreement only, viz: that the defendant, without any sufficient cause, refused to continue him in its service for the period of three years, the term for which he was employed by it. By means of this breach of the agreement, he avers he has been thrown out of employment, and sustained damages to a large amount.

Had this count in the declaration closed here, there could be no doubt of its sufficiency, and freedom from all exception. For all that is required in declarations on agreements of this kind is, that they set forth a good and sufficient cause of action; and here we have an averment of performance, and readiness to perform the agreement to serve the defendant for the term of three years, accompanied by the further averment that the defendant below deprived him of his place and discharged him without cause. The law requires, that both in setting out the agreement, and assigning the breach, enough must be placed on the record to show that the contract has been broken; and that the plaintiff had a cause of action. Breckenridge v. Lee, 3 Bibb, 330; Hard v. Trimble, 3 Marsh. 533; Watts, Ex'r, v. Sheppard, 2 Ala. Rep. 426. In assigning the breach, it is not necessary to use the precise terms of the agreement sued on, but it is sufficient to state the intention of the parties, as it may be collected from the instrument itself. 10 Wheat. 449; 5 Mod. 133; 10 Mod. 150. Nor is it necessary that the breach assigned should negative the performance of the defendant's contract in every particular; if it has been performed in part, it is enough to aver a non-performance of the residue. Dale v. Roosevelt, 9 Cow. Rep. 308.

Although in assigning a breach, the plaintiff must do it in

such terms as to show that the defendant has broken his contract, in consequence of which a right of action has accrued to him, yet a mere informal matter, superadded to a good breach, would not be a fatal objection on general demurrer. 5 East. 270; 5 B. & C. 284. It would be regarded as surplusage, furnishing no ground for demurrer, the maxim being, *utile per inutile non vitiatur*. Stephens' Pleadings, 422.

We must apply these general rules to the declaration before us It has been shown that the breach assigned is sufficient to warrant a recovery, but it is argued for the plaintiff in error, that the declaration is rendered defective because the pleader had added the words "and has lost and been deprived of a large sum of money, to-wit, five hundred dollars, for expenses incurred in removing from said city of Montgomery aforesaid, back again to said city of Boston." This is a mere deduction of a right to particular damages, arising from the breach previously assigned, and can only be regarded as surplusage. It cannot affect the breach assigned, which is full and complete without it, and it may be stricken out, or disregarded, 2 Ala. 425.

There is no error in the record, and the judgment of the Circuit Court must be affirmed.

FROWNER ET AL. *vs.* JOHNSON ET AL.

1. Upon a bill filed in the Court of Chancery for the distribution of an estate, if one of the distributees dies after the commencement of the suit, it must, as a general rule, be revived against his personal representative; and a failure so to revive will be error, although the objection is not raised in the court below.
2. A decree of distribution having been made to the children of a deceased distributee, the assignment that there is error in the decree of distribution presents the question whether the sums decreed were distributed to the proper parties.
3. The plaintiff in error will not be decreed full costs in the Appellate Court, when the error, for which the decree of the court below is reversed, might have been remedied if the objection had been raised in the primary court.

ERROR to the Chancery Court of Mobile.

Tried before the Hon. J. W. Lesesne.

PERCY WALKER and RAPIER, for plaintiffs in error.

1. Elizabeth C. Acre was a devisee under the will, which was sought to be set aside. She was an essential party. The bill prayed that she be made a defendant; but she was never brought before the court by service of process; nor did she voluntarily appear and submit to its jurisdiction. The decree, on this account, cannot be sustained, whether she and the other defendants below, or the other defendants without her, object to it. McMaken v. McMaken, 18 Ala. Rep. 578; Batre et al. v. Auze's Heirs, 5 Ala. Rep. 173; Story's Eq. Pl. 76; 1 Peters 299; Cockburn v. Thompson, 16 Ves. 325; Inge et al. v. Boardman, 2 Ala. Rep. 335.

2. As to the amendment of the bill: There was issued a notice of application to amend. This notice was not served by the sheriff; but purports to have been acknowledged by this party; but there was no proof of her acceptance of service, and in such case, that which purports to be acceptance of service is not *prima facie* evidence of notice to her. 9 P. 426; 7 P. 171; 3 Ala. Rep. 276.

The affidavit of the non-residence of the defendant, King, is defective in not setting out, as required by rule, whether he was a minor or not.

The eighth rule of Ch. Prac. (Clay's Digest 613) authorizes the Register to make orders allowing amendments; but such orders shall only be made upon five days notice to the adverse party. The defendant, King, had no notice; nor had Caroline E. Acre notice; for there is no proof that she accepted service.

The thirteenth rule Ch. Prac. requires that amendments shall be served within sixty days after they are filed, or they shall be considered as waived. In this case there was a material amendment, and no service of it was attempted to be effected upon King and Caroline Acre. Yet the amendment was not regarded as waived, and the cause progressed as if notice had been given.

3. As to the revivor on the death of Mrs. Johnson. The death of Mrs. Johnson, one of the complainants, was suggested in February, 1845. The suit could only be revived in the names of her heirs, by bill of revivor. The fifteenth rule Ch. Prac., authorizing a revivor by *sci. fa.*, applies only to a case

where an administrator or executor is sought to be made a party. The term personal representative means an executor or administrator. 2 Bouvier's Law Dict. 319; 5 Ves. 402; 2 Ala. Rep. 335; 4 P. 245. The revivor as a revivor by *sci. fa.* is altogether irregular and insufficient.

All applications to the Register, when a notice is required, should be in writing. (Rule 9, Ch. Prac.) There was no such written application.

Whether the proceeding is by bill of revivor, or by *sci. fa.*, notice to the parties in interest must be given.

Notice addressed to defendants, Frowner and wife and Magee, was issued in February, 1845, notifying them that an order of revival would be made, unless cause to the contrary was shown, &c. Service of this notice purports to have been accepted by Frowner for himself and wife; but there is no proof of Frowner's signature, and it is as if no service had been made. (See authorities on this point, Supra.) But if the proceedings had in the court below, since the pending of the cause in this court, should be regarded as establishing the acceptance of service by Frowner; yet his acceptance of service for his wife was not authorized, and was insufficient to conclude her rights. The bill seeking to affect her separate estate, service of subpœnas and notices upon her husband alone was not sufficient, but should have been both upon husband and wife. 1 Barbour's Ch. Prac., p. 50, and authorities there cited.

After notice issued that an order of revival would be made, &c., the Register made an order that *sci. fa.* issue in favor of the heirs of Mrs. Johnson to revive according to rule. No *sci. fa.* issued pursuant to this order.

All orders for the revival of proceedings must be regularly served. 3 Daniel's Ch. Prac. 1709; 1 Harr. 71; 5 Ala. Rep. 173.

It is error to proceed to a decree on a bill of revivor, without process on the bill of revivor executed. Sweet v. Bigg, 5 Litt. 17; Shields v. Craig, 6 Monroe 373.

In a proceeding to revive, the question of the competency of the parties to revive is a material one, and the parties already upon the record must have an opportunity to contest the right of the reviving party. 2 Sumner 383; 11 Ves. 311.

The vitality of the cause having been suspended by the death of the complainant, and not being regularly revived, no decree could be rendered affecting the interest of the defendant. Cullum et al. v. Batre's executor, 2 Ala. Rep. 419; 1 Ala. Rep. 725; Story's Eq. Pl. 397, 369. Conceding that an irregularity in the proceedings to revive may be waived, there is nothing from which a waiver, by plaintiffs in error, can be inferred. See 2 Ala. Rep. 419, above cited.

Again: the revivor should have been in the name of the administrator of the deceased, and not in the name of her heirs.

PHILLIPS and SEWALL, for defendants.

One of the appellants in error having shown to the court that she has not authorized the writ of error, and does not desire the reversal of the decree, the assignment of error must be made by the other appellants alone. Cullum v. Batre, 1 Ala. Rep. 126.

The decree cannot be reversed for any error which effects the appellant alone, who is content with the decree. Bumpas v. Webb, 4 Port. 66; Barker v. Callahan, 5 Ala. Rep. 708.

Where record shows that publication was ordered against non-resident defendant, the court will presume that the fact of publication was made. Swift v. Stebbens, 4 S. & P. 447. Nor is a defect in the order of publication available on error. McGowen v. Branch Bank, 7 Ala. Rep. 823; Cowart v. Howard, 12 Ala. Rep. 265.

Defendant in contempt not entitled to notice, to state the account, and can make no objection to irregularity. Mussina v. Bartlett, 8 Ala. Rep. 277; Butler v. Butler, 11 Ala. Rep. 668.

Proof of acceptance of service by Frowner of the *sci. fa.* to revive the bill, may be made *nunc pro tunc* even after writ of error sued out. Cullum v. Batre, 2 Ala. Rep. 419; Moore v. Horn, 5 Ala. Rep. 234; Godbold v. Megginson, 16 Ala. Rep. 143. And the acceptance in his and his wife's name was good as to her. Hollinger v. Branch Bank, 8 Ala. Rep. 605. But if service were not good as to Mrs. Frowner, the assignment of error being made jointly with her husband, cannot be noticed by this court.

The objection that the administratrix of Mrs. Johnson should have been made a party complainant in the bill to revive, cannot be sustained; there is no such requisition, where a married woman dies who has filed a bill jointly with her husband and others; and if such were the law, the objection cannot be made for the first time in this court. Gayle v. Singleton, 1 Stew. 566; Batre v. Auze, 5 Ala. Rep. 573; Rugeley et al. v. Robinson, 10 Ala. Rep. 702; Butler v. Butler, 11 Ala. Rep. 668; Alderson v. Harrison, 12 Ala. Rep. 580. Nor if the objection could be here raised would the court notice it, because not among the errors assigned.

Mere technical defects and irregularities are waived, by the party subsequently proceeding in the cause without objection. Cullum v. Batre, 2 Ala. Rep. 419; Batre v. Auze, 5 Ala. Rep. 173; Davenport v. Bartlett, 9 Ala. Rep. 180; Holman v. Bank of Norfolk, 12 Ala. Rep. 369; Rail Road Co. v. Talman, 15 Ala. Rep. 472.

GOLDTHWAITE, J.—This was a bill filed by the defendants in error against the plaintiffs, to set aside the will of Samuel Acre, and for distribution of the estate, as in case of intestacy.

In the progress of the case, an issue of *devisavit vel non* was *awarded* and tried in the law court, which resulted in a verdict against the will, which being certified to the Chancery Court, a decree was there rendered setting aside the will. After this, and before an account of the assets of the estate was taken, Margaret Johnson, one of the complainants and a distributee of said estate, died, and thereupon a *scire facias* was issued to the *children* and *heirs* of said Margaret, to make them co-complainants, and to revive in their names. The suit was so revived, nothing being shown on the record why the personal *representative* of said Margaret was not made a party complainant as well as the children, the will of the said Acre embracing personal as well as real estate. Upon the final decree, the children of Margaret Johnson were decreed the distributive share, which would otherwise have been decreed to said Margaret. No objection was made in the court below for the want of proper parties. The general assignment, that there is error in the decree of distribution, brings,

as we think, properly before this court for revision, not only the errors which enter into it, resulting from the adoption of erroneous principles of law or equity in arriving at the result, but also whether the sums so distributed are decreed to the proper persons; if, in other words, there is not an interest outstanding in a stranger to these proceedings, which may afterwards be asserted against the plaintiffs in error, and require all the proceedings in this case to be overhauled. The rule is, that when there is a party having an interest in the subject matter of the litigation, whose interest cannot be concluded by the decree, and who may afterwards proceed for the recovery of his interest, as though no decree had been rendered, then the Court of Chancery, as it cannot act definitely on the rights of the parties, and might do injustice to others by a decree grounded upon a partial view only of the real merits, will not proceed until such absent party is brought before it. Such person is an indispensable party, and the objection that he was not brought before the court can be taken for the first time in the Appellate Court. Gould v. Hayes et al., 19 Ala. Rep., and cases there cited. In the case of Hall's Distributees v. Andrews, 17 Ala. Rep. 40, which involved the precise question we are now considering, this court uses the following language: "The object of all litigation is to settle, finally and conclusively, the rights of the parties in respect to the subject matter in controversy. This cannot be done, unless the parties legally entitled are before the court as parties to the proceeding. It is clear, that if an administrator should hereafter be appointed upon the estate of any of the deceased distributees, this decree of distribution would not be binding on him, and he could call the administrator to an account for the distributive share of his intestate, and this decree would form no bar to his demand." The case last cited, it is true, was on error from the Orphans' Court; but the reasons of the decision are applicable in their full force to chancery practice. We do not say that there may not be cases, where it is allowable for the distributee of a deceased distributee to take without the intervention of an administrator, but those cases are properly regarded as exceptions to the general rule, and to sustain them it is necessary to show affirmatively that an administration would have

been a useless ceremony. 16 Ala. Rep. 494. We are not advised that there are no debts existing against the estate of Margaret Johnson; neither does the record inform us that there is not an administrator, and the whole property here decreed to the children of Margaret Johnson may be needed to pay her debts. If her distributees wished to avoid the expense of an administration, it was incumbent upon them to show there was no necessity for it; and this not being done, such representative becomes *prima facie* an indispensable party, and the decree which vests the distributive share of Mrs. Johnson in her children, and furnishes the representatives of Acre no estoppel against a subsequent suit of the personal representative of Margaret Johnson, was clearly erroneous. Our decision upon this point renders it unnecessary to consider the other questions raised upon the record.

The proceedings had in the court below must be reversed back to the point where the error commenced, which is the issue of the *sci. fa.* to revive in the name of the children of Margaret Johnson; that her administrator may be made a party complainant, and the suit revived in his name as her personal representative. In all other particulars up to that point it is affirmed.

We do not think this a proper case for full costs to the plaintiff in error. The objection on which we have reversed could have been remedied had it been made in the court below, and for that reason let each party pay half the costs of this court.

BROOKS *vs.* McFARLAND.

1. When the declaration contains only the common counts, and the statute of limitations of *three years* is pleaded as a bar, the plea is bad unless it avers that the plaintiff's demand is for an open account; and this, though the statute is pleaded "in short by consent."

ERROR to the Circuit Court of Fayette.

Tried before the Hon. Wm. R. Smith.

This was an action of assumpsit, for services as an attorney at law and solicitor in chancery. The declaration contains the common counts only, three in number, for an *indebitatus assumpsit*, for work and labor, and on a *quantum meruit*. The pleas were, the general issue and some others; among them the statute of limitations of three years, which is pleadin these words: "Defendant in short by consent pleads the statute of limitations of three years." There was a demurrer to this plea of the statute of limitations, which demurrer the court overruled.

The parties went to trial, and the whole of the evidence, which was by deposition, is set out in the record, and establishes very clearly the right of the plaintiff to recover, unless barred by the statute of limitations. The court instructed the jury that they should find for the defendant. The testimony also shows that the plaintiff's demand was an open account.

The overruling of the demurrer to the plea of the statute of limitations, and the charge of the court as aforesaid, are assigned for error.

P. & J. L. MARTIN, for plaintiff in error.
No counsel for defendant.

PHELAN, J.—There can be no doubt of the correctness of the charge of the court below, under the proof, if the statute of limitations had been properly pleaded.

The precise question here raised by the demurrer to the plea of the statute of limitations was decided by this court in the case of Winston v. The Trustees of the University, 1 Ala. Rep. 124, where the court held, that where the declaration contained the common counts only, and the statute of limitations of *three years* was interposed as a bar, the plea is not good unless it avers that the demand of the plaintiff is for an *open* account. For the reason of the court at length, see that case. The court erred in overruling the demurrer. The error of the court in sustaining the plea, entered of course into the trial and instruction to the jury.

The judgment is reversed, and the cause remanded.

PATTON & BURGEN *vs.* RAMBO.

1. Secondary evidence will not be received in lieu of primary, unless the original or primary evidence cannot be produced; and when all the evidence is of a primary character, it must go to the jury, and cannot be excluded because more conclusive proof might have been offered.
2. On the trial of an action for the false warranty of a slave, plaintiff introduced as a witness a physician who had been practicing eleven or twelve years, and who testified that he had prescribed for the slave for a month or two, and had given him a thorough examination, and that his opinion, formed from such examination, was, that he was unsound at the time of the sale. It also appeared, that another physician, who had been practicing seventeen or eighteen years, had been called in to the slave about two months before the witness, and had attended him for a time, but had removed to an adjoining county. Plaintiff did not call him as a witness, nor was any reason assigned for the failure to call him. *It was held*,

   That the court properly refused to instruct the jury, on the request of defendant, "that if they believed plaintiff had a skillful physician attending the slave before witness was called in to him, and his attendance at court could have been obtained, but plaintiff had not procured it, nor given any reason why he had not done so, that this was a circumstance which they ought to consider, in determining whether or not the testimony of that physician, if he had been produced, would not make against the plaintiff."

ERROR to the Circuit Court of Lowndes.
Tried before the Hon. Robert Dougherty.

THIS was an action of COVENANT, brought to recover damages for the false warranty of a slave, sold by the defendants to the plaintiff, on the first of April, 1850. It appeared, that the slave did ordinarily good work on the plantation of the plaintiff for several months after his purchase, and in May or June after the purchase, the plaintiff expressed himself better pleased with the boy than he had expected he should be. But about August, the slave had an attack of fever, and was sick until winter. The plaintiff introduced Dr. Jackson as a witness, who testified, that he was called in to see the boy, in November, 1850, and prescribed for him for a month or two; that he had given the boy a thorough examination, and gave it as his opinion, formed from such examination, that the boy was unsound at the time of the sale. It also appeared, that Dr. Henkle had been called to the boy about two months before Dr. Jackson, and had attended him for a time, but

that he had removed to Montgomery, about twenty-four miles from the place of trial. It further appeared, that both Henkle and Jackson were good physicians; that Henkle had practiced seventeen or eighteen years, and Jackson eleven or twelve years. Henkle, who had been called to see the boy about two months before Jackson attended him, was not called by the plaintiffs as a witness, nor was any reason assigned why he was not. These are the material facts that gave rise to the following request, made by the defendant, for instructions; "that if the jury believed, that the plaintiff had a skillful physician attending the slave before Dr. Jackson was called in, and his attendance at court could have been obtained, but the plaintiff had not procured it, nor given any reason why he had not done so, that this was a circumstance that the jury ought to consider, in determining whether or not the testimony of that physician, if he had been produced, would not make against the plaintiff." This charge the court refused to give, and the defendant excepted.

George W. Stone, for plaintiffs.

1. Testimony will not be received, which in its nature supposes the existence of a higher grade of evidence. A party will not be allowed to make out his case by circumstances, when it appears that he has the means of proving the facts positively, and fails to do so. Or when suspicion is cast on a transaction, and the opposite party could, but fails to produce evidence that would make the case clear, in such case the law presumes that the better evidence, if produced, would disclose facts prejudicial to the party withholding them. This presumption is founded in our common experience, which teaches, that a man will always offer the best evidence in his power, to establish his case.

2. Whenever, in the progress of a cause, it is shown that other testimony, much more satisfactory, might have been adduced, and no effort was made to obtain it, and no excuse given for the failure to produce it, the jury is authorized to infer that such testimony, if adduced, would make against the party. Rex v. King, 5 C. & P. 123; 24 E. C. L. R. 239; Mervin v. Ward, 15 Conn. 377; Rector v. Rector, 3 Gilman, 105; Governor v. Roberts, 2 Hawks' R. 26; Columbian Ins.

Co. v. Lawrence, 2 Peters' 25–44; Cockerell v. Smith, 1 La. Ann. R. 1, (cited in 3 U. S. Ann. Digest, 208, § 140.) If this rule is not of universal application, it certainly applies to this case; for the physician who is first called in to a patient has the best opportunity of forming a correct opinion as to the origin and duration of the disease.

3. The witnesses in this case are experts, and their testimony was offered in that light. This court has decided, that the opinion of a physician of "superior skill, and greater power or opportunity of observation, is entitled to greater weight, although both witnesses are competent." Tullis v. Kidd, 12 Ala. Rep. 650.

4. It is no answer to this argument, to say that the defendants might have called Dr. H., if his testimony was in their favor. The defendants presumed that the plaintiff would produce the testimony of the attending physicians, and could not tell who they were, until their names were disclosed at the trial.

DARGAN, C. J.—The general rule in reference to the question raised in this case is, that secondary evidence shall not be received in lieu of primary, unless the original or primary evidence cannot be produced; and when all the evidence is of a primary character, it must go to the jury, and cannot be excluded because more conclusive proof might have been offered. Greenl. Ev. Vol. 1 § 8; Tayloe v. Riggs, 1 Peters, 591; The United States v. Reyburn, 6 Peters, 352.

This rule the counsel for the plaintiff does not controvert, but he insists, that even when all the evidence, both that which might have been introduced, as well as that which is introduced, is primary or original in its character; still, if that which is offered is less satisfactory and conclusive than that which might have been, but was not, introduced, this is a circumstance that makes against the party, and should be so considered by the jury, in weighing the testimony actually introduced. I am not satisfied, that the authorities to which he refers sustain the distinction which has been drawn. But if it were admitted, that the distinction does, or ought to exist, yet it is very certain, that before the court should instruct the jury, that the failure to introduce the more conclusive

proof was a circumstance against the party, it should clearly appear to the court, that the proof withheld, or not introduced, could more clearly or fully explain the point in issue, than the proof relied on did. Unless this should be made distinctly to appear, no one could say what the evidence withheld could explain or show; and certainly no party is bound to introduce every witness to a fact, that might be called; he need only prove the fact sufficiently. Before, therefore, the evidence introduced can be impugned, or in the slightest degree impeached, upon the idea that the party has withheld the better or more conclusive evidence, it must distinctly appear, that the evidence not introduced could more clearly explain the fact in controversy, than the evidence offered.

Applying this test to the case before us, there is no error; for we cannot, nor could the court below say, that Dr. Henkle was better qualified to testify to the character of the disease under which the slave labored, than Dr. Jackson. They were both shown to be physicians of skill, and though Dr. Henkle was called in first, it does not appear that he did more than prescribe for the ordinary fevers of the country. But when Dr. Jackson was called to see the slave, two months afterwards, he examined the slave thoroughly, and from this examination testified as to the nature and duration of the disease. Under these circumstances, we cannot say that Dr. Henkle could have testified more accurately than Dr. Jackson, and therefore it did not appear that the plaintiff could have introduced more satisfactory or conclusive proof than he did.

Let the judgment be affirmed.

JONES *vs.* NIRDLINGER.

1. In assumpsit by the owner of a slave to recover money which his slave had paid to the defendant on being detected in stealing goods from his store; the slave's confession, made at the time of the payment, that he had stolen other goods from the defendant equal in value to the money paid, is admissible evidence for the defendant, as a part of the *res gestae*, to show the character of the payment and the circumstances under which it was made.

ERROR to the Circuit Court of Madison.
Tried before the Hon. Thos. A. Walker.

This was an action of assumpsit by the plaintiff in error against the defendant. General issue, and verdict for the defendant.

It appears, from a bill of exceptions sealed upon the trial, that the plaintiff proved that the money sued for was paid over to the defendants by a negro man, the slave of the plaintiff; that the slave was allowed by his master, the plaintiff, to hire his own time, make contracts, &c., and to keep what he made, paying his master hire. The proof showed that the slave was employed by the defendants as a servant in their store, and while in their employ, was detected in purloining goods from the establishment, whereupon he was taken up by the clerk of the defendants, who, in company with the town constable, examined his house, and found several pieces of goods belonging to the defendants, and five hundred and eight dollars in money. It was shown that the defendants' store had been previously robbed of goods, and that small sums of money had at different times been missed from the money drawer, to which said slave had access. It appeared, however, that the slave had three or four hundred dollars before he entered the defendants' service.

Upon finding the goods in his possession, the slave confessed that the goods they had found belonged to the defendants; that he had stolen them from their store, and had frequently stolen from them, and had sent some of their goods to Limestone County; he further stated, that although he could not tell the amount he had thus stolen, he was satisfied he had taken enough to amount to two hundred and fifty dollars, and that if the defendants would be satisfied with that sum, he would willingly pay it to them for the goods he had stolen. The defendants thereupon accepted the money, and the slave kept the goods. In the court below, the plaintiff's counsel moved to exclude the confessions of the slave from the jury, but the court overruled the motion, and this ruling of the court is here assigned for error.

D. C HUMPHREYS, for the plaintiff:

Insisted, that from the relation the slave bore to the mas-

ter, what money the slave was possessed of belonged to the master; that in view of that relation, considerations of public policy forbid that the admissions of the slave should be received to defeat the action by the master; that the slave was no party to the record; had no interest in the subject-matter of the suit; and that there was no such legal privity between the master and slave in respect to their right to the property, as would legalize the admissions of the slave as evidence. He denied that the slave had such legal existence as would render his admissions evidence to the prejudice of others, upon the ground that they constituted part of the *res gestae*, and argued, that to bind the master by such admissions, the slave must have express authority from the master as his agent.

In support of these views he cited 1 Greenl. Ev. §§ 171, 180, 189, 191, 170, 177, and Mauldin & Terrill v. Mitchell, 14 Ala. Rep. 814.

R. C. Brickell, for the defendant:

Argued, that the declarations of the slave were parts of the *res gestae;* that they were contemporaneous with the main fact, and were admissible as part of it, in order to explain and elucidate it. He cited Enos v. Tuttle, 3 Conn. R. 250; 1 Greenl. Ev. §§ 120, 108; Rowland v. Walker, 18 Ala. 749; Anderson v. Lord Kinnard et al. 6 East, 188; Parris v. Jenkins, 2 Rich. Rep. 106.

CHILTON, J.—After a careful examination of this case and the authorities cited, we are satisfied that the court below properly refused to exclude the declarations of the slave.

The master sought to recover money which the slave had paid to the defendants. The proof showed that the slave hired his own time from his master, and was permitted by him to make contracts for himself, and to receive what he made. It therefore became necessary to ascertain the nature of this payment, in order to determine the rights of the parties growing out of it; for, although the slave and the property he may possess, alike belong to the master, still it is settled, that if the latter permit his slave to retain and dispose of a portion of his earnings, he cannot recover them back,

Skanklin v. Jones, 9 Ala. Rep. 271. In order, then, to ascertain the character of the payment, it was indispensable to give evidence of the contemporaneous parol agreement, in compliance with which the money was paid. All the concomitant circumstances tending to elucidate and explain the payment, and to show on what account it was made, were properly admissible as parts of the *res gestae;* 1 Greenl. Ev. § 108; Rowland v. Walker, 18 Ala. Rep. 749, and cases there cited.

The admissions of the slave, and the proposition made by him to pay the money, as based upon them, and the actual payment on the acceptance of the proposal, are parts of one transaction, and, as contemporaneous connected circumstances, are indispensable to show in what manner the slave parted with the money sued for, and the character in which the defendants received and hold it. There is nothing in the case of Mauldin & Terrill v. Mitchell, (14 Ala. Rep. 814,) which militates against the view here taken; for in that case it was held that the declaration of the slave was not connected with any act done, and could not, therefore, have constituted part of it. See 2 Rich. R. 106.

Let the judgment be affirmed.

HUCKABEE, Adm'r. *vs.* SWOOPE.

1. A legatee may come into a court of equity to enforce payment of his legacy from a refractory executor.
2. When the enjoyment of a legacy is made to depend upon a condition subsequent, and the performance of that condition depends alone upon the legatee, who has the power to do what is required, and he fails to perform it, such failure will work a forfeiture of the legacy.
3. But where, upon the marriage of the testator's widow, her husband takes control of the family, locks the house against his wife's sister, and refuses her admission, she cannot be held to have *voluntarily abandoned* the testator's family, or to have forfeited a legacy, which was made to depend upon her remaining single, and living in the testator's family.
4. A will contained these clauses: "I also wish that my sister-in-law, S., be considered as one of my heirs, so far as a support, but not as a legal heir to a part of my estate; provided she lives single, and in my family. It is also my wish that my executor shall collect all moneys due me, by note or account,

and apply said moneys to the purchase of negroes or stock, for the benefit of my plantation and family. It is also my wish that my family be well supported, in health and sickness, out the proceeds of my plantation and other effects." The testator further directed, that his plantation should be kept up, at the discretion of his executor; that his estate should not be divided, until his oldest child arrived at the age of twenty-one, or married; and that, if his widow married, her legal share of the estate should be set apart and allotted to her. The widow having married again, her share of the estate was allotted to her, and S. afterwards filed a bill against the administrator to enforce the payment of her legacy. *It was held,*

1. That the testator's "family" was not dissolved by the marriage of his widow, but continued to exist *until the time appointed for a final division of the estate*; and that the complainant was entitled to a support out of the estate until that time, unless she forfeited it by her voluntary abandonment of the family, or marriage.

(CHILTON, J., *dissenting*, held, That she was entitled to a support *for life*, unless forfeited by her voluntary act.)

2. That neither the widow and her husband, nor the children were necessary parties to the bill.

ERROR to the Chancery Court of Greene.

Tried before the Hon. W. W. Mason.

Sarah A. Swoope filed her bill, against the plaintiff in error as administrator with the will annexed of Henry S. Mason, deceased, setting forth that said Mason died in September, 1843, leaving a large estate both real and personal, which he disposed of by his will, which was duly made and recorded; that among other bequests, it contained the following: "I also wish that my sister-in-law, Sarah A. Swoope, be considered as one of my heirs so far as a support, but not as a legal heir, to a part of my estate, provided she lives single and in my family;" that in said will, James Dorrah was named as executor, who, shortly after the death of testator, proved the same as to the personal estate, and had it admitted to record in the Orphans' Court of Greene county, and took on himself the burden of its execution; that said personal estate amounted in value to about the sum of thirty thousand dollars.

That at the death of the testator his family consisted of his widow and three infant children, and complainant, who had resided with them for several years before that event. That the eldest child died, soon after the testator, and, with that exception, the family continued the same until February,

1846, when the widow married Bushrod W. Bell, who took took the charge and management of the family, living at the former homestead of said Henry S. Mason, deceased.

That shortly after the marriage of the widow, the executor resigned his trust, and the defendant Huckabee became the administrator with the will annexed, and took charge of the estate, amounting to about twenty-eight thousand dollars in value.

That complainant continued to live in the family as constituted, after the marriage of the widow, until the month of September, 1846, when, on returning from a temporary visit to a friend, she found the house locked, her room entirely disfurnished, and her furniture thrown into the yard, and she was informed and believed, that it was the result of orders given by Bushrod W. Bell, who, by his marriage, had become master, or head of the family.

In consequence of this, and other acts of unkindness on the part of said Bell, she was compelled to leave the society of her sister and her children, and seek an asylum elsewhere.

That she was, and is still single; that she is destitute, and has applied to the defendant to allow her a support out of the estate of said Mason, as directed by his will, but that he refuses to do so.

The bill prays that a sufficient sum for her support and maintenance be decreed out of the profits of the estate, on final hearing, and also for an order setting apart a sum for support *pendente lite*, as well as for general relief.

The answer admits every material allegation in the bill, but insists, that on the marriage of the widow with Dr. Bell, the family of Henry S. Mason ceased to exist, and that he did not feel authorized, after that event, to make any appropriation out of the estate for support of complainant.

The answer contained a demurrer, in which two grounds are set out: 1. The want of proper parties defendants. 2. Want of equity.

The proof sustains the allegations of the bill, in every material part, and on the points really at issue, there is no conflict of evidence.

E. W. Peck, for plaintiff in error;

1. The bill is wanting in equity, and should have been dismissed. The clause of the will under which the complainant claims, shows very clearly, that the testator did not intend that any *fixed sum* should be raised out of his estate and paid to her. He wished her *to be supported*, only, and that on two conditions, viz: while she remained unmarried, and a member of his "family." The word "family" is of very indefinite meaning; sometimes meaning "heirs;" sometimes, "children;" and sometimes, "widow and children." 2 Jarm. on Wills, 25; 2 Story's Equity, § 1065. When employed in a will, the true meaning must be ascertained by considering the circumstances in which the testator was placed, the objects which he had in view, and the context of the will. Blackwell v. Bull, 1 Keen, 176, (15 En. Ch. R. 177.)

In this case, the word certainly means the testator's wife and children, and the complainant, so long as she continued to live single and with them. It must be recollected that the testator was under no obligation to provide even a support for complainant. If he had intended that she should be entitled to a support during her life, upon the single condition that she remained unmarried, whether she lived in his family or not, he could have said so, and made provision accordingly. He looked forward to a time when his family should cease to exist, viz: on the marriage of his widow, when her share of the estate was to be allotted to her. Until that time arrived, the "family" was to be supported out of the proceeds "of the plantation and other effects," and this support was to be furnished by the executor. But the marriage of the widow caused a division of the estate, and dissolved the family.

Again; conceding that complainant's right to a support out of the estate was not determined by the marriage of the widow, and that she quit the family because she was driven from it by the ill-treatment of Mr. Bell, still this does not entitle her to have a fixed sum set apart for her support. If the ill-treatment of the husband has deprived her of a support, it is a wrong for which he is personally responsible. Her redress is against him for the injury, and not against the estate, or rather the widow and children.

2. The husband of the widow was an indispensable party to the bill, which seeks redress against an injury which he

caused. No proceeding can be maintained to redress an injury, without making the guilty person a party.

3. The widow and children were necessary parties; for they, and not the administrator, would be injured by a decree in favor of complainant. Story's Eq. Pl. 186, § 205.

J. R. CLARK, for defendant in error.

1. The complainant was entitled, under the will of the testator, to a vested pecuniary legacy on condition subsequent. 2 Wms. on Exors. 904; 2 Lomax on Exors. 76; 3 Peters U. S. 374; 2 Ed. Ch. R. 78; 6 Bac. Ab. 271.

2. Has she done any act to deprive her of it? It is a maxim "that the act of God shall injure no one," and why? Because no one can control it; and for precisely the same reason the act of a third person, beyond the control of another, shall not injure that other. If the condition was one that it was impossible to perform, then the complainant would be entitled to the legacy without performance. 2 Wms. on Exors. 907; 2 Lomax on Exors. 76; Clarke v. Parker, 19 Vesey 16.

3. And this on the ground that the legatee was not in fault, as was the case of Blackburn v. Edgely, 1 Peere Wms. 604.

4. The family, of which the complainant was a member, was destroyed by the testator's widow uniting in forming a new family, of which the complainant could not be a member under the will of the testator. 6 Bac. Ab. 272.

5. There are no words in the will to show that the testator designed that the complainant should forfeit her legacy in the event that the widow married, and we have no right to imply that such was his intention.

6. Here it is contended that the widow, by marrying, and that without the consent of the complainant, could not only deprive her of her legacy, but add to her pecuniary means by divesting the legacy entirely. This is not to be tolerated in equity. "Equity will not allow any one to take advantage of the bequest over, who has himself been instrumental in causing a breach of the condition." See Lord Strange v. Smith, Ambler, 263; and asserted by counsel *arguendo*, and not denied in D'Aquilar v. Drinkwater, 2 Vesey. & B. 230; 2 Black. Com. 124, note, (ed. 1843.)

7. Conditions subsequent are always construed with great strictness as they divest estates already vested. 2 Wms. on Exors. 913, marg.; 2 Lomax on Exors. 78.

8. Burchett v. Woolward, 1 Turner & Russell 441, 11 Eng. Ch. Rep. (Con.) 241, is a case almost identical with this, and there the Master of the Rolls decided that the annuity was not forfeited.

9. The administrator was the only necessary party defendant. Cherry et al. v. Belcher, 5 Stew. & P. 133; 1 Dan. Ch. Pr. 302; Mitf. Eq. Pl. 171; Story's Eq. Pl. § 140; 26 Peters 370.

LIGON, J.—The first question presented for our consideration arises on the demurrer to the bill for want of equity; should this be sustained, the case is at an end.

The bill is filed by the complainant below, as one of the legatees under the will of Henry S. Mason, deceased, to enforce the payment of a legacy. The clause of the will under which she claims is in these words: "I also wish that my sister-in-law, Sarah A. Swoope, be considered as one of my heirs so far (as) a support, but not as a legal heir to a part of my estate: *Provided*, she lives single and in my family." The complainant charges in her bill that she is still single, but has been forced by unkindness to leave the mansion house and children of testator; that his widow has married one Bushrod W. Bell, who has taken possession of the homestead and control of testator's children, and by his unkindness she has been unwillingly compelled to abandon both.

That a legatee has a right to come into a court of equity to compel payment of his legacy from a refractory executor, is a proposition which we do not understand to be denied on the part of the plaintiff in error. But it is contended, that the complainant, by leaving the family of the testator under the circumstances named in the bill, violated one of the conditions upon which she was to continue in the enjoyment of the bequest in her favor, and forfeited her legacy.

The rule is, that if the enjoyment of a legacy is made to depend upon a condition subsequent, and the performance of that condition depends alone upon the legatee, who has the power to do what is required to be done, but fails to do it,

such failure will work a forfeiture of the legacy. But is this the case here? By the allegations of the bill, to which alone we can look under the demurrer for want of equity, the very reverse of this state of case is presented. For three years the complainant faithfully performed the conditions imposed, and enjoyed the bequest in her favor. At the end of that time a new head is placed over the family of the testator, and this, too, without either her agency or consent. He takes control, and in the exercise of his power as master of his family, he casts her furniture out the house in her absence from home, locks the door against her, and orders that, on her return, she is not to be admitted. We can see no analogy, whatever, between the facts of this case and those of any case in which the failure to perform a condition subsequent has been held to operate the forfeiture of a legacy.

It is also contended, that by the marriage of the widow with Bell, the "family" of the testator was extinguished, and thus the condition becoming impossible, the legacy to the complainant fails, or is void. It is needless, at this point of the case, to examine to what extent, if any, the legacy of the complainant would be affected by the fact, that one of the conditions upon which she was to continue in its enjoyment had become impossible, after her right to it had vested, and she had enjoyed it; since, according to our view of the meaning of the word "family," as used by the testator, it still exists, and will continue to exist until the time appointed by him for its dissolution. To limit its signification to the testator's wife and children, would do violence alike to his intention and to the etymology of the word. It has no fixed, technical, legal sense. When employed in a will, the English Court have sometimes held it to mean "heir," at others "children," and in others "widow and children." 2 Jar. on Wills 25; Story's Eq. §1065–6. In every case, however, those courts have defined it in that manner, which, in their opinion, best comported with the intention of the testator. We will adopt the same rule in this case, believing it to be the only safe and proper one.

The word occurs in three several clauses in the will before us: First, in that containing the bequest to the complainant; second, in the clause which immediately succeeds it, and in

which he directs his executor to collect the debts due him, "and to apply said moneys to the purchase of negroes or stock for the benefit of my plantation and family;" third, in the last clause, which is in these words, "It is also my wish that my family be well supported, in health and sickness, out of the proceeds of my plantation and other effects."

In all these instances, we apprehend the testator intended to include the white, as well as the slave members of his household. The will is written very inartificially, and doubtless the testator intended to employ the words used in their ordinary sense; and in this State the term family, in common parlance, comprehends not only the wife and children of the master, but his slaves also. To include the latter, not only does no violence to the etymology of the term, but is in strict conformity to it. Over this family, and in its management, the executor is substituted for the master, and while his power to keep it together, and employ its operatives for the common benefit, continues, it exists in legal contemplation, as well as in fact. By the terms of this will, the executor is required thus to control it, until the oldest child becomes of age or marries. Then, and not until then, did the testator intend that his family should be dissolved, and we are inclined to think, that at that period also, he intended that the provision made for the defendant in error should cease.

The bill does not show that this event has happened, by which the right of complainant to a support would be at an end, and therefore there is no hindrance to the complainant in coming into a court of chancery to assert her rights.

Our conclusion is, that the demurrer for want of equity is not well founded.

The demurrer for want of proper parties defendant, cannot be sustained. Bell and wife should not have been joined with the administrator with the will annexed, since they have no interest in the fund sought to be charged with the payment of the legacy of complainant; for it appears that the portion of the testator's estate to which Mrs. Bell was entitled, had been allotted to her before the bill was filed, and separated from the bulk of it in the hands of the plaintiff in error. Neither do we regard the infant children of the testator as necessary parties, as the administrator with the will annexed

was in charge, under the will, of the estate sought to be subjected, and had full power, as trustee, to protect their interest. 1 Dan. Chy. Prac. 302; Story's Eq. Pl. § 140.

The Chancellor, therefore, did not err in overruling the demurrer.

In discussing the questions arising on the demurrer, we have been compelled, in a great measure, to examine the whole merits of the case, for neither the answer nor proof puts any new phase upon the point really at issue. The testimony, however, shows that the complainant was a single lady, the sister of the testator's wife, for several years an acceptable and valued member of his family, with no protector except himself, and no means of support but such as she derived from his bounty. She is known, also, to have been kind and attentive to his children, especially to one of them who was lame, decrepit and diseased. Under these circumstances, though no legal obligation rested upon him to do so, yet it is by no means extraordinary, that the testator should, out of his ample means, provide for her a support, at least so long as his children were minors, and leave her afterwards to the kindness and protection of those whose infancy she had watched over and nursed, whose affections she had won, and whose gratitude, in mature years, would extend to her in age the support she might need and the protection she might require.

We think a fair construction and interpretation of the will shows, that this was what the testator intended to do. He wishes his executor to keep up his plantation, but leaves this to his discretion. He then provides for the education of his children at the best schools, and devotes the proceeds of his plantation for that purpose; "and that there shall be no division of my property until my oldest child shall become of age or marry; and in the event of my wife's marriage after my death, it is my wish that my property shall be divided according to law, and she to receive her lawful right of all my effects, and the balance to remain in the hands of my executor until my oldest —— becomes of age or marries, at which time I wish my property equally divided between my children then living." The next clause contains the provision in favor of the defendant in error, which has already been quo-

ted, and need not be here repeated. The next directs his executor to collect the debts due him, and purchase negroes and stock for the plantation and family; then follows the last, which has been once copied in this opinion, and directs the executor to support his family well out of the proceeds of his "plantation and other effects."

To say that he intended the provision made for the support of his family to cease on the marriage of his widow, is wholly unauthorized. He devotes a fund to this purpose, the proceeds of plantation and other effects, and in other parts of the will, he desires that his property should be kept together until his oldest child becomes of age or marries, thus fixing, beyond a well-founded doubt, the period at which this provision should cease. At this period he directs that his property shall pass absolutely to his children, to be held by them in their own right; and at this period, too, both his estate and his family, in the sense of the will, are, by his appointment and direction, dissolved forever.

He wishes the defendant in error to be considered as one of his "heirs so far as a support, but not as a legal heir to a part of his estate." Evidently intending to use the term "heir," where it first occurs, in the sense of "child." The provision, then, for her support, is just such as he made for his children, and no more. The latter, at a particular period, (when the oldest child becomes of age or marries,) are to receive and enjoy the body of his estate, in his language, "as legal heirs;" but the former is forbidden to take any portion of his estate in such right.

These views sufficiently define the rights of the defendant in error, under the will of the testator, and as the result arrived at by us renders it necessary that the case should go to the Master in the court below, and as the reference to that officer was the only decretal order made by the Chancellor, it only remains to be said, that the decree of the Chancellor is affirmed, and the cause remanded, to be proceeded on in the court below, according to the view expressed in this opinion.

Let the decree be affirmed, at the costs of the plaintiff in error.

CHILTON, J.—I concur with my brethren, in the opinion

that the defendant in error is entitled to a support out of the estate of the testator, but dissent from that portion of the opinion which holds that her right is to terminate when the oldest child marries or arrives at the age of twenty-one. The will gives her a present right to a support upon the death of the testator, and this right is dependent for its continuance upon two conditions subsequent. One is, that she remains in the testator's family, the other, that she remains single.

The obvious meaning of the testator was, that if Miss Swoope *voluntarily* abandoned his family, or married, the provision for her support should cease. It clearly was not in his contemplation that a change in the condition of his family, whether wrought by the marriage of the widow, or the death of the children, or sale or division of the slaves, or from any other cause over which Miss Swoope had no control, should defeat the provision for her support. Had he intended the provision to cease upon the majority or marriage of his oldest child, I presume he would have so stated it in the will. But he has not done so, and as his declared intention, being legal, must be the law for the government of the court, when called on to execute the will, I cannot fix a period for the termination of the "support" which the testator has not prescribed. The division of the estate upon the majority of the oldest child, or his marriage, is not at all inconsistent with the bequest to Miss Swoope.

The established rule, in regard to the construction of conditions subsequent, requires that the court should construe them strictly, and if their performance becomes impossible, the legacy is not divested by the failure to perform; see 2 Lomax on Ex'rs. 78; 2 Wms. on Ex'rs. 913; 11 Cond. Eng. Ch. Rep. 241; and cases collected in 2 Bridgman's Digest, 170, 178. In my opinion, the clear intent of the testator was, to give this lady a support for life, unless, by her *voluntary* act of leaving his family or marrying, she should forfeit it; and to hold that he designed to deprive her of a support at the time when she would be most likely to need it, and this without any fault of hers, would seem to be repugnant to the motive which prompted him to give her anything by way of support.

McCOY *vs.* ODOM.

1. The retaining possession in this State of personal property for three years, under a loan made in another State, is within the second section of the statute of frauds, unless the loan is recorded pursuant to its provisions. (Clay's Dig. 254–5.)
2. The possession of the husband, under a loan to his wife and children, is the possession of the loanee within the second section of the same statute.
3. Where the donees of personal property are minor children, residing with their father, the possession of the property by the father will be referred to the title of the children, and is not within the second section of the statute of frauds, although it may have commenced under a loan to his wife and children, *and there was no actual change of possession.*
4. Possession of personal property for three years under a loan, does not subject it to the debts of the party who has possession, unless his creditor, while it is thus held, acquires a lien on it by reducing his debt to judgment and taking out execution.
5. On a trial of the right of property in slaves between the plaintiff in execution and the minor children of the defendant, the claimants cannot prove that it was a matter of public notoriety in the neighborhood, that defendant disclaimed all interest in, and ownership over, the slaves.

ERROR to the Circuit Court of Russell.

Tried before the Hon. E. Pickens.

This was a trial of the right of property of certain slaves, which had been levied on by an execution in favor of the defendant in error against one Hudson. The levy was made on the 29th November, 1849, and on the trial there was evidence conducing to prove, that the slaves levied on were originally the property of one Stegers, in the State of Georgia, who was the father-in-law of Hudson, and the grand-father of the claimants; that he loaned the slaves by parol to his daughter, the wife of Hudson, then in life, and her children, for their especial use and benefit, but with a special reservation of the right of property to himself, being at the time a citizen of, and resident in, the State of Georgia; that the slaves were brought into this State, and remained here about eight or ten years, in the possession, or at the house, of the defendant in execution, with his wife and children, who were minors; that Stegers paid taxes regularly for the slaves in this State, and that the possession of Hudson was always accompanied

with a disclaimer of any ownership to the property on his part, and by declarations that they were the property of Stegers, and loaned to his wife and children; that Mrs. Hudson, the wife, died in January, 1848, and that after her death, Stegers made a deed of gift of the slaves to the claimants, who were her only children—the slaves, the children, and Hudson, being in this State; that the deed of gift was executed in Georgia, and delivered to an officer of that State, authorized by law to record such instruments, to be recorded, and was there duly recorded; that the debt of Hudson to the defendant in error was created in April, 1848. The claimants offered to prove that it had been a matter of public notoriety in the neighborhood of the Hudson family, that Hudson always disclaimed any interest or ownership in the slaves; which was objected to, and the objection sustained.

The court charged the jury:

1st. That if the slaves were loaned in the State of Georgia, and subsequently removed to this State, and retained in the possession of the loanees, under the loan, for more than three years previous to the levy, although they were retained for the use of the wife and children, the property must be found subject to the execution, unless the loan was in writing, duly proved and recorded according to the statute of frauds of this State.

2d. That if the deed of gift was made in the State of Georgia, and duly recorded there according to law, and that before the creation of the debt of the defendant in error against said Hudson, and that said Stegers, at the time of the execution of the deed of gift, was a resident of the State of Georgia; yet if the property remained in this State subject to the control of the donees, for three years prior to the levy of the execution, without returning into the actual possession of said Stegers, the property must be found subject.

3d. That if the property in controversy was loaned to the wife and children of the defendant in execution, for their especial use and benefit, and went into the possession of the wife while living with her husband, that would be such a possession in the defendant in execution as to bring it within the statute of frauds of this State; and if the property remained in this State for three years prior to the levy of the execu-

tion, in the possession of said wife and children, that would be the possession of the defendant in execution, and in such case the property must be found subject, unless the loan was in writing, duly proved or acknowledged, and recorded according to the statute of frauds of this State.

The sustaining the objection to the testimony offered, and the several charges as given, were excepted to, and are here assigned for error.

HOOPER, for plaintiff in error.

1. The loan was made in Georgia, and the *lex loci* must govern, no matter what the form of the contract may be. Lyde *et al.* v. Taylor *et al.* 17 Ala. 274; Adams v. Broughton, 13 ib. 731; Catterlin v. Hardy, 10 ib. 511; 5 Porter, 142; 10 Ala. 949; 17 ib 643; 2 Kent. 394, 458; Story's Conf. L. 219, § 262.

2. The possession of the father will be referred to the title of his children, who were minors, and resided with him. Sewall v. Gliddon, 1 Ala. 53; Thomas v. Wallace, 5 ib. 276; Maull v. Hays, 12 ib. 502.

3. The delivery of the deed to the proper officer for registration in Georgia, perfected the gift to claimants. McCutcheon v. McCutcheon, 9 Porter, 658; McRae v. Pegues, 4 Ala. 159; Sims v. Sims, 2 ib. 117; Phillips v. McGrew, 13 ib. 255; 8 Porter, 449; 12 Ala. 29.

4. The deed of gift operated as a revocation of the loan, and it was unnecessary that the donor should resume the actual possession. Maull v. Hays, 12 Ala. 502; 9 ib. 657; 4 ib. 204. The debt of the plaintiff in execution was not created until after the revocation of the loan.

5. The evidence of "public notoriety," as to the defendant's disclaimer of interest or ownership, was improperly rejected. Hill *et al.* vs. Duke, 6 Ala. 259.

BELSER, *contra.*

1. The exception, as to the notoriety of Hudson's disclaimer of an interest in the property, cannot be sustained. School District v. Blakeslee, 13 Conn. 227; Iron Co. v. Bennett, 7 Cowen, 234; Goddard v. Pratt, 16 Pick. 412; Glover v. Millings, 2 Stew. & P. 28; Bank v. Parker, 5 Ala. 731; Tharp v. Herndon, 5 Porter, 382; Harris v. Taylor, 13 Ala. 325.

2. It is at least questionable, whether the deed of the donor was ever delivered to the donees. Durett v. Seawell, 2 Ala. 669; Caldwell v. Edwards, 5 Stew. & Por. 312.

3. The several charges given by the court to the jury, were proper ones; and the evidence shows no resumption of the possession of the property by the donor from the date of the loan to the execution of the deed. The case stood at the time of the levy precisely as if the deed had never been executed, so far as Hudson's creditors are concerned. Grissett v. Agee, 14 Ala. 354; Myers v. Peek's Adm'r, 2 Ala. 649; Maull v. Hays, 12 Ala. 499; Gay v. Mosely, 2 Monr. 543; Morris v. Bradford, 4 Ala. 204.

GOLDTHWAITE, J.—The question presented on the first of the several charges given is, as to the effect of that portion of the second section of the statute of frauds of this State in relation to loans. The clause referred to is in these words: "And in like manner, where any loan of goods and chattels, shall be pretended to be made to any person, with whom or those claiming under him, possession shall have remained for the space of three years, without demand made and pursued by due course of law on the part of the pretended lender; or where any reservation or limitation shall be pretended to have been made of a use, &c.; the same shall be taken, as to the creditors and purchasers of the persons aforesaid so remaining in possession, to be fraudulent within this act, and that the absolute property is with the possession; unless such loan, reservation, &c., were declared by will, or deed, in writing, proved and recorded as aforesaid;" and it is insisted that, as the charge concedes that the loan in this case was made in another State, where the lender and the borrowers resided, and where the subject of the loan was located, upon this state of facts the property, after its removal by the borrowers voluntarily into this State, is exempted from the operation of the clause of the statute referred to. The rule that the validity of a contract is to be determined by the law of the place where it is made, which is relied on to sustain this position, is recognized to its fullest extent; but the error of the argument consists in its application to the case under consideration. The rule itself, it is to be remembered,

has its foundation on principles of comity, rather than right, and creates no binding obligation on a community, to enforce a contract which is injurious even to its own interests, much less one which is in opposition to its laws. It is certainly competent for Alabama to provide to what extent property within her limits shall be subject to execution, or in what manner, when brought within her jurisdiction, it is to be affected by certain acts. This is done by every statute of limitation or repose which is passed by her Legislature, conferring the title to property on the party in possession; and the idea that by the rules of comity, which are always based upon just considerations of public policy, property voluntarily carried within the limits of a foreign jurisdiction is entitled to immunities which are not bestowed upon its own citizens, or exempted from consequences to which they are exposed, cannot be entertained. In view of the facts presented, the question does not involve the validity or enforcement of a contract made in another State; it is simply determining the legal consequences which, by a statutory provision, attach to a certain act committed in this State. The clause of the statute we are examining, in the language of Collier, C. J., in the case of Myers v. Peek's Adm'r, 2 Ala. Rep. 648, "provides the manner in which one person shall retain his right to personal property, which he permits to go into the possession of another, and declares that if the directions of the act are not observed, the claims of creditors shall prevail, after the possession shall have continued under the loan for three years. Such a possession authorizes a legal conclusion in favor of creditors, which cannot be gainsayed." These reasons are equally as applicable to loans made out of the State, as to those made within its jurisdiction.

We are aware that the reasoning of this court, in the cases to which we have been cited by the counsel for the plaintiff in error, Catterlin v. Hardy, 10 Ala. Rep. 511, Adams v. Broughton's Adm'r, 13 Ala. Rep. 731, and Liden v. Taylor, 17 Ala. Rep. 270, as also the case of Turner v. Fenner et al. 19 Ala. Rep. 355, deciding that the continuance of the possession for three years in this State without recording, does not affect the title of the remainder-man, as to creditors and purchasers from the party in possession, on the ground that in

the particular cases referred to, the deed creating the remainder was executed in another State, is in opposition to the conclusions which we have attained; but we all concur that the reasons on which those decisions are based cannot be sustained; and while we feel constrained to adhere to the rule established by them, we prefer to rest it on the ground on which the decision of this court in Smith v. Ruddle, 15 Ala. Rep. 28, is placed, which restrains the meaning of the words "absolute property," as used in the second section of the statute of frauds, to the title which the lender had in the property. It follows, that if the lender had the absolute ownership of the property, the fact that the loan was made in another State cannot avoid the consequences, which result from the continuous possession in this State, by the borrower, for the length of time required by and under the circumstances defined by the statute.

Upon the assumption that the loan was made to the wife and children, the slave having come into the possession of the husband, it is the same in legal effect as if the loan had been directly to him and the children, Maull v. Hays, 12 Ala. Rep. 499; and we entertain no doubt that where a loan is made to two, or more, and the possession remains with one under the loan, and the other circumstances required by the statute to render the possession absolute as to creditors exist, that the property can be levied on and sold. We would not be understood as deciding here, that the interest of the other loanees would be divested, but simply that in the particular case put, the property could be levied on and sold on execution against the borrower in possession, leaving the other question open. It follows there was no error in the first charge given.

2. The instructions given by the court, that if the possession once commenced under that clause of the statute of frauds of this State which refers to loans; such possession would not be affected by a gift of the same property made in another State, unless the same had been returned into the actual possession of the owner, was erroneous. It cannot be doubted that if the possession of Hudson, under the loan, had terminated, and the possession of the property passed to the children under a valid gift, before the creation of the debt to the defendant in error, that under that state of facts the prop-

erty could not be subjected to the payment of the debt of Hudson. Maull v. Hays, 12 Ala. Rep. 499. The execution of the gift, would in law be equivalent to the resumption of the property for the only purpose for which, in such case, it could be required, to transfer its possession to the donee; and to establish the gift, all that was required to be proved was, a declaration of intention by the donor, united with his parting with his right of dominion over the property in favor of the donees. 2 Ala. Rep. 117. It was not in any manner essential to the validity of the gift, to prove an *actual* resumption of the property by the lender. If the gift was valid and complete, the children being minors and residing with their father, his possession would not in that case be inconsistent with their ownership. Sewall v. Gliddon, 1 Ala. Rep. 52. The question as to the validity of the gift should have been submitted to the jury, with the necessary instructions, and if upon the evidence the possession of the father was referable to the gift to the children, it would have been withdrawn from the operation of this clause of the statute; while on the other hand, if there was no gift, either from the failure to deliver the deed, or from the want of any other circumstance necessary to its validity, and the possession of Hudson was properly to be referred to the loan, the consequences which, in the previous part of this opinion we held, must attach to such possession, would necessarily follow. This part of the charge amounted to instructions to the jury, that the commencement of the possession under the loan rendered it necessary for the lender to resume the *actual* possession of the property, before he could legally dispose of it by gift, which would be valid as to creditors who had not then acquired liens on the property, and in this it was erroneous.

3. The legal principle asserted by the third part of the charge was also incorrect, in making the right of the defendant in error to condemn the slaves to the satisfaction of his claim, depend entirely on three years prior possession, and the failure to record, without reference to any other fact. The defendant in execution may have had three years possession in this State under the loan, without any rights resulting to a subsequent creditor. If the possession of the defendant in execution under the loan had terminated, as in this,

case the evidence conduced to prove, before the creditor acquired a lien on the property, by reducing his debt to judgment and taking out execution, under the decision previously cited of Maull v. Hays, the property, after such change of possession, would not be subject to the debts of the creditor under this clause of the statute. The tendency of the charge in this aspect was to mislead the jury, by instructing them in effect, that if the defendant in execution, Hudson, had been in actual possession of the property for three years before the levy, it was sufficient to condemn the property, although the evidence may also have shown that his legal possession terminated before the execution debt was contracted.

As to the evidence objected to, the action of the court was correct. At the most, it could only have been admitted as a fact, from which the creditor might have been presumed to have had notice of the true condition of the property, and in this aspect we do not consider it as admissible. It follows, that for the error of the court in the second and third instructions, the case must be reversed and the cause remanded.

EVANS *vs.* BELL.

1. In an action on a promissory note which purports on its face to have been given "for the rent of land," the defendant cannot introduce parol proof to show that the payee also agreed to repair the fencing around the land, and that he failed to do so, in consequence of which failure defendant's crop was damaged by the breaking in of stock.
2. When judgment is rendered in the court below against the defendant and his surety on the replevy bond, the judgment will be reversed and properly rendered in the Appellate Court against the defendant alone.

ERROR to the Circuit Court of Morgan.

Tried before the Hon. L. P. Walker.

This was an action, (commenced by attachment) on a promissory note executed by Evans to Bell, purporting to have been given "for the rent of land." On the trial, the defendant offered to prove "that after he had passed into the pos-

session of the land, for the rent of which the note was given, the plaintiff, upon being applied to by the defendant's overseer to repair the fencing around said land, said that it was his (plaintiff's) business to repair the fencing, but that he would take his own time for doing so; and that in consequence of the fencing not having been repaired, the crop planted on said land by defendant was damaged by the breaking in of stock." The evidence was rejected by the court, to which the defendant excepted. There was a verdict for the plaintiff, and thereupon judgment was rendered against the defendant and his surety on the replevy bond.

R. C. Brickell, for plaintiff in error.

D. C. Humphreys, for defendant.

PHELAN, J.—The decision of the court below on the point of law is affirmed, on the authority of the case of Paysant v. Ware & Barringer, 1 Ala. 160.

For the error in giving judgment against the security on the replevy bond as well as the defendant, the judgment below is reversed, and rendered against the defendant only in this court.

O'NEAL *vs.* BROWN.

1. A witness may testify to the value of certain goods conveyed by deed of assignment, although he had made out a written invoice or schedule of the goods six or seven weeks previously to the assignment.
2. The schedule, if produced, would not be evidence of the value of the goods at the time of the assignment.

Error to the Circuit Court of Tuskaloosa.

Tried before the Hon. George D. Shortridge.

This was an action of trespass against the defendant, who was a Marshal of the United States, for levying on a certain stock of goods, which the plaintiff claimed under a deed of assignment executed to him by Theron Brown on the 10th

May, 1845. "To prove, among other things, the amount of the assets included in said deed of assignment, the plaintiff introduced one Perkins as a witness, who stated that he was the clerk of the said Theron Brown before the said assignment, and of the plaintiff afterwards; that no schedule or invoice of the effects assigned was made at the time, but that one was made on the first day of April before, and that he had the same in town, and was proceeding to state the amount of the same, when the defendant's counsel objected, and insisted that the said schedule or invoice should be produced, as better evidence than the recollection of the witness. The court overruled the objection, and the defendant excepted."

E. W. Peck, for plaintiff in error.

1. The inventory was better evidence than the recollection of the witness, and it should have been produced, or the witness should not have been permitted to speak of the amount of said inventory. 1 Greenl. on Ev. § 82 to 88; 3 Porter, 433.

2. Parol evidence is not admissible, if there is written evidence to the same point within the power of the party offering it. Cloud v. Patterson, 1 Stewart, 394. A witness cannot testify to the amount of a record, or any written instrument, unless its absence is accounted for. 2 Miss. Rep. 198; 2 U. S. Dig. par. 262 § 1322; 4 N. Hamp. 169.

P. & J. L. Martin and Watts, Judge & Jackson, *contra*.

It was unnecessary to produce the memorandum; the memory of the witness was just as competent as the memorandum. 1 Green. on Ev. § 88 to 95. If a party can speak of his own knowledge, there is no necessity to produce a receipt in writing, though one exist. Johnson v. Cunningham, 1 Ala. 249; P. & M. Bank v. Borland, 5 Ala. 531.

DARGAN, C. J.—The object of introducing the testimony of the witness Perkins was, to prove the value of the effects that were conveyed by the deed of assignment, and not to prove the simple amount set down in the schedule or invoice that he had made before the assignment was executed. If the latter had been the object of the testimony, that is, if the witness had been called to prove the amount or value of the

goods, as contained in the schedule itself, then the schedule would have been the best evidence of its own contents. But it is very clear that this schedule, if produced, would not have been evidence of the value of the goods conveyed by the deed. It was a mere *ex parte* memorandum, and could be evidence of nothing, except to prove its own contents, if that had been the object of the inquiry. But as that was not the point of inquiry, it could have served no purpose to produce it, for when produced, so far from being the best evidence to prove the fact in issue, it would not have been evidence at all. The ruling of the court below is free from error, as is shown by the decisions of this court. Pharr & Beck v. Bachelor, 3 Ala. 237; Sparks v. Rawls, 17 Ala. 211.

Let the judgment be affirmed.

THE STATE BANK *vs.* EDWARDS & WALKE.

1. The answer of a corporation not being under oath, the same amount of evidence is not required to disprove its denials as in other cases.
2. When an execution, which has been levied on property of the principal debtor sufficient to satisfy it, is returned by order of the plaintiff, and the property released, the surety is discharged.

ERROR to the Chancery Court of Tuskaloosa.
Tried before the Hon. W. W. Mason.

Edwards & Walke filed this bill to restrain the collection of a judgment which the State Bank at Tuskaloosa had recovered against them. The bill alleges that the complainants became the sureties for one Houston, in 1837, on a certain note which was discounted by the said Bank; that the note was extended at maturity by the Bank, and a new note executed by Houston with other securities, and that this was done without the knowledge of complainants; that the Bank afterwards, notwithstanding the extension of the debt, and the discharge of complainants, brought suit against them and Houston, on their original note, and complainants, being still ignorant of the arrangement between Houston and

the Bank for the extension of the debt, suffered judgment to go against them by default; that an execution was issued on this judgment, and was levied by the sheriff on ten bales of cotton, which was more than sufficient to pay the balance due on the judgment, after deducting payments made on the debt by Houston; that this execution was returned by order of the Bank, and the property discharged, without the knowledge or consent of complainants; that Houston soon afterwards became insolvent, and removed from the State; and that the Bank had issued another execution on the judgment against complainants, which was then in the hands of the sheriff. The answer of the Bank, under its corporate seal, denies all the material allegations of the bill, and demands proof. The chancellor held the proof sufficient, and rendered a decree in favor of complainants, perpetually enjoining further proceedings for the collection of the judgment.

P. & J. L. MARTIN, for plaintiff in error.

1st. The first ground relied on in the bill is, that before suit was brought at law, the Bank extended the time of payment of the note to the principal, Houston, without the consent of complainants, of which they were ignorant, until after the judgment at law. This charge is denied by the answer, and there is no proof of the fact.

If this charge was made out by proof, it would not be sufficient as made in the bill, for it is not pretended that the Bank is implicated in the concealment, nor do they charge or show their diligence to discover the same; and hence, the complainants are subject to the rule laid down in the cases referred to here. French v. Garner, 7 Por. 549, and the numerous cases subsequent.

2d. The second ground relied on by complainants is, that after the judgment was obtained, an execution thereon was levied on certain cotton of the principal, Houston, of sufficient value to have satisfied the judgment, which was released to the said principal, and the execution returned by order of the plaintiff. This charge is denied by the answer, and the proof is utterly insufficient to sustain it.

This point, if completely sustained, affords no ground for the relief sought. In this view we are fully sustained, by

many decisions of this court, a few *only* of which I here refer to. The recent case of Godden & Lowry v. The Bank, decided by this court, the opinion by Justice Chilton, fully settles this view. 15 Ala. Rep. 616, and cases there cited.

If either of the grounds set up by the bill be true, the complainants had ample remedy at law.

The alleged extension of time afforded a defence at law, for failure to make which, the excuse is insufficient.

The second ground in regard to the levy of the execution, if good for anything, was available at law also, by *supersedeas*, as is shown by the case of Lockhart & McElroy, and the subsequent cases. 4 Ala. Rep. 572.

JOHN, for defendants.

1. The note upon which the sureties were liable, was extinguished by the payment made by Falls for Houston, the principal, and the proceeds of the new note of Houston, Walker & Easley, discounted by the Bank. 4 Ala. Rep. 50; Theobald, on Prin. & Surety, 1 Law. Lib. p. 2, § 5, p. 67, § 148.

But if the principal debt was not extinguished, the testimony shows clearly and conclusively, that the note of the sureties was extended. There is no doubt, therefore, that this was an extension of time on new and good consideration, and this releases the sureties. 18 Ala. Rep. 641.

From the state of the pleadings in this case, it must be taken, that the extension was without the knowledge of the sureties. The Bank did extend, and it was the duty of the Bank to prove the assent. The Bank should have given the sureties notice of the transaction, if they intended to hold the sureties liable, and can take no advantage of the want of knowledge on the part of the sureties. 1 Story's Equity Pl. 320, §§ 324, 325; 6 Ala. Rep. 718; Theobald, on Prin. & Surety, 1 Law Lib. p. 87, § 177.

The sureties have not lost the right to avail themselves of this defence, because of the judgment of the law. The excuse they render is sufficient. They did not know, and could not be required to know, that the defence existed. It was therefore impossible for them to defend. Nor was there a single fact that was sufficient to put them on inquiry. They cannot be blamed in any sense for not defending. 7 Ala. Rep. 664; 8 ib. 745, 767; Breese R. 147.

If the securities had knowledge of the defence, and had failed to make their defence from negligence or misfortune, then the case might be brought within the rule relied on by the plaintiff in error on this point; or if anything had transpired calculated to put them on inquiry, then on this point there might be some ground to invoke the aid of French v. Garner, 7 P. 552, and Lee & Norton v. Insurance Bank of Columbus, 2 Ala. Rep. 21, and Stinnet & Townsend v. Br. Bank at Mobile, *et al.* 9 Ala. Rep. 120.

The ground of jurisdiction in this case was originally exclusively equitable, and although the courts of law now allow this equitable defence, the chancery jurisdiction has not thereby been destroyed. The cases above referred to, and relied on by the plaintiff in error, were cases of exclusive common law jurisdiction. But in this case, the court had jurisdiction before judgment, and that jurisdiction has not thereby been destroyed or taken away. This constitutes a marked distinction between the cases cited by plaintiff in error, and the case at bar; consequently, no excuse is necessary in a case like this case. 3 Ala. Rep. 521; 9 ib. 127; 10 ib. 305; 13 ib. 198.

The facts show, that the Bank is attempting to practice a gross fraud on the securities. It extended the debt without giving the securities any notice; received the entire amount of the original debt, and then, because the sureties are ignorant of the facts, sues them and obtains a judgment, and now insists that they shall be protected, and allowed the benefit of this fraud, because it kept the truth from the knowledge of the sureties until after it procured the judgment; and after it had obtained judgment, it continues this unfair dealing with the sureties, and recklessly discharges the levy made on the property of their principal, sufficient to pay all claimed to be due. These facts bring the case within the rule as laid down in the case of French v. Garner, 7 P. 552, and all the cases of that class; consequently this unfair dealing of the Bank authorizes the relief sought, by the authority of these cases. And the case of Welborn *et al.* v. Tiller *et al.* 10 Ala. Rep. 305, and Greenlee v. Gains, 13 Ala. Rep. 198, are in point.

It is a universal rule in chancery, that laches cannot, in equity, be attributed to a party before the discovery of the

fraud, mistake, or other ground of relief. This rule must apply in this case with great force, for the sureties knew nothing of the defence or fraud until after the judgment. It would be the greatest injustice to make them suffer the loss, and allow the Bank to get the money twice, because of the improper conduct of the Bank being concealed from them by the Bank. 17 Ala. Rep. 564; Breese R. 147.

2. But if the court should think the foregoing positions insufficient, then it is insisted, that, as the sheriff had levied the execution on property of the principal debtor sufficient to satisfy the execution in full, and had the same in his possession, that the Bank, by interfering by their order to release the property from the levy, destroyed the lien acquired by the levy, and thereby discharged the sureties. 1 Story's Eq. Pl. 320, 321, §§ 324–5–6; Theobald, on Prin. & Surety, 1 Lib. pp. 84–5–7, § 174; Mayhew v. Crickett *et al.* 2 Swanst. 193; Chichester, Adm'r. v. Mason, 759; 7 Leigh's R. 244, 253; Bullitt's Ex'rs v. Winston's, 1 Mun. 269, 278.

Although this court has modified some of the rules on the subject of the release of sureties, which have been laid down by text writers, and have adopted a rule diferent from the rule in some other States, *yet this court has never decided that the facts as presented in this case do not discharge the sureties.*

The case of Sawyer v. Bradford, 6 Ala. Rep. 572, the leading case on the subject, and the case on which the other cases on the subject rest, is unlike this case. The question here presented was not raised in that case, or considered by the court, and could not be, for the facts did not authorize it. The plea in that case did not show that any levy had been made, or that any lien of any kind had been acquired. If the facts of this case had been set out in that plea, the decision would doubtless have been different.

In the case of Wilson v. Bank of Orleans *et al.* 9 Ala. Rep. 847, the facts were entirely different. The property of the surety was released from levy, and not the property of the principal. The surety received no damage by the arrangement. But the court intimated a different rule, if the property of the principal had been released. The case of Royston, Adm'r, v. Howie, 15 Ala. Rep. 309, is unlike this case, because no levy was made in that case, nor was there any

agreement to delay. In the State Bank v. Godden & Lowry, 15 Ala. Rep. 616, although there was a levy, there was no interference by the Bank with the levy; the Bank gave no order to release the property. In this case the Bank interfered, and destroyed the sureties' rights in the property levied on.

CHILTON, J.—We deem it unnecessary in this case to notice any other than the question whether the defendants in error, who were the complainants in the court below, are not entitled to relief by reason of the interference of the Bank, in ordering the sheriff to return the execution which had been levied on the principal debtor's property, by means of which the levy was discharged.

The proof in this case that the execution was delayed by the Bank, is not very explicit; but we think the answer of the Bank not being sworn to, the same amount of evidence is not required to disprove its denials as in other cases, and that the proof of the sheriff and deputy sheriff is sufficient, under the circumstances, to show that the return of the *fi. fa.* against Houston was by order of the Bank. 17 Ala. Rep. 258. We come then to consider the effect of this interference on the part of the Bank upon the rights of the securities. The counsel for the defendant in error supposes that the previous decisions of this court have settled, that the creditor's right to enforce payment out of the securities is not impaired; but upon a careful examination of them, we find none which go to this intent. The furthest this court has gone was, in holding that the sureties were not discharged by a return of an execution against the principal debtor by order of the creditor, when it appeared there was property of the principal, which could have been levied on, sufficient to pay the debt, and that he afterwards became insolvent. Sawyer v. Bradford, 6 Ala. Rep. 572; Royston, Adm'r, &c., v. Howie, use, &c. 15 Ala. Rep. 309.

It is further held, that the mere delay or want of diligence in enforcing the execution, or an agreement to delay based upon no valid consideration, will not affect the creditor's right. See cases above, and The Bank v. Godden and Lowry, 15 Ala. Rep. 616, and cases there cited. True, in the case last

referred to, it is stated that a levy had been made in the case of Sawyer v. Bradford, *supra;* but this was a mistake, as will be seen by reference to that case.

In this case, after allowing the credit of $838 $\frac{79}{100}$ as of the 2d May, 1838, but a small balance, say $250, would have remained due upon the execution. To pay this, the sheriff levied on ten bales of cotton, the property of Houston, the principal debtor, which he doubtless deemed sufficient to satisfy the execution, and which we infer from the proof of its subsequent sale at the usual rates, was sufficient, had it been applied. The effect of a withdrawal of this execution was an abandonment of the levy, and a return of the goods in which the sheriff, for the benefit of the creditor, had a qualified property.

The authorities are generally agreed, that this operated a discharge of the securities. The principal case upon the subject is that of Mayhew v. Crickett, 2 Swan. Rep. 185, where the creditor, after a levy, had withdrawn the execution. Lord Chancellor Eldon held, that the creditor was a trustee of his execution for all the parties interested, and although he might remain passive if he chose, yet if he took the debtor's goods in execution, and afterwards withdrew the execution, he discharged the surety both at law and in equity. This has been the settled law since that case, and the principle there decided has been adopted by the elementary writers on the subject. Pitman on Pr. and Su. 176–7; Theob. on Pr. and Surety, 143; Burge on Suretyship, 206; 1 Story Eq. §§ 324–5–6. It is unnecessary for us in this case to decide whether we should hold the securities discharged absolutely, or only *pro tanto*, since we regard the levy in this case sufficient.

This view is not only supported by authority, but in most cases will mete out substantial justice, as it certainly does in this. No one can read this record, which discloses that this debt was extended by the execution of a new note, with other security, anterior to the judgment against these securities; the misapplication of an instalment paid by Falls, as proven by the deposition of himself and the cashier, to the payment of another demand; the order to credit, after the judgment; the execution issued thereon, with $838 $\frac{79}{100}$ the proceeds of the note given to renew the demand on which this judgment was

rendered, which note had been discounted long anterior to the rendition of the judgment; followed by an order to return the execution, which had been levied on the property of the principal debtor, who was then in failing circumstances, and who shortly thereafter became insolvent—but must see that palpable injustice will be done them to enforce this payment. They had the right to repose on the assurance, which the conduct of the Bank was so well calculated to create in their minds, that the demand was paid; otherwise the Bank would have suffered the sheriff to sell the debtor's property, and thus have made the money. We apprehend, moreover, that when the Legislature enacted that the sheriff should levy on the property of the principal debtor first, as by the statute, Clay's Dig. 206 § 23, it was not intended that the creditor should frustrate this provision, designed for the securities' protection, by discharging the levy, and yet hold the security liable.

We are of opinion that the securities are entitled to the relief which they seek, and that the court of equity is the proper forum in which to obtain it.

Let the decree be affirmed.

HARRELL *vs.* WHITMAN.

1. On the trial of an issue contesting the answer of a garnishee, who denied an indebtedness to the defendant in attachment, the record of a judgment recovered by the defendant against the garnishee subsequent to the service of the garnishment, is admissible evidence for the plaintiff, to show the recovery of such judgment, and the time of its rendition.
2. It is not error to instruct the jury, that they must find for the plaintiff, if they believe that the indebtedness on which the judgment against the garnishee was rendered existed prior to the service of the garnishment.

ERROR to the Circuit Court of Lowndes.

Tried before the Hon. Robert Dougherty.

Whitman sued out a writ of attachment against one Powers, and summoned Harrell as his debtor. Harrell appeared,

and answered, denying any indebtedness; the plaintiff contested the truth of the answer, and an issue was made up under the statute. On the trial of this issue, as appears from the bill of exceptions, the plaintiff offered in evidence a transcript of a judgment recovered by Powers against Harrell, in a suit which had been commenced after the service of the garnishment, stating at the same time, that he would introduce evidence in connection therewith, to show that the indebtedness on which said judgment was recovered, existed prior to the service of the garnishment. The defendant objected to the reading of the record, but his objection was overruled, and he excepted. The plaintiff then proved that the said indebtedness, on which the judgment in favor of Powers v. Harrell was recovered, existed prior to the service of the garnishment in this case. To this evidence, also, defendant objected, but the objection was overruled, and he excepted.

The court charged the jury, that if from the evidence they believed that the indebtedness, upon which the judgment in favor of Powers v. Harrell was founded, existed before Harrell was summoned as garnishee in this case, then they must find for the plaintiff; to which charge the defendant excepted. The admission of the record, and the charge of the court are now assigned for error.

I. B. Stone, for plaintiff in error.
Geo. W. Stone, *contra.*

LIGON, J.—Although it is well settled, that the record of a recovery in another suit, is admissible evidence only as between parties and privies to such suit, yet this rule has its qualifications. As between strangers, it is admissible to prove the judgment contained in it; and it may be admitted, when used by way of inducement, or to establish a collateral fact, though the parties are not the same. 1 Greenleaf Ev. 564; 3 Stew. 247; 7 Por. 466. For both the purposes above mentioned, the record of the judgment and proceedings in the case of Powers v. Harrell, was offered by the defendant in error in the court below. Harrell had, in his answer to the garnishment in this case, denied his indebtedness to Powers; the truth of this answer was controverted by the defendant

in error, and on the trial of this issue, the record before mentioned was offered, to show that Powers had recovered a judgment against Harrell for a certain sum, subsequent to the service of garnishment; this was a collateral fact, which that record could alone establish, and for the purpose of proving which, it was rightly permitted to go to the jury.

The charge of the court to the jury was predicated upon the proof that the indebtedness, on which the recovery of Powers against Harrell was founded, existed anterior to the time when the process of garnishment in favor of the defendant in error was served upon Harrell. It does not appear from the record, that there was any conflicting proof on this point, and it would be difficult to frame a charge to the jury more pertinent and unexceptionable than the one given by the court below.

There is no error in the record, and the judgment must be affirmed.

McCALL'S, ADMR. *vs.* CAPEHART & HARBIN.

1. One who enters into the possession of unoccupied lands without any claim of right or title, and for the purpose of keeping the true owner out of possession, is a trespasser.
2. A contract, by which a trespasser agrees to sell the possession of land acquired by the trespass, cannot be sustained.
3. It is not maintenance for a person to promote a suit or defence, in which he has, or believes that he has, a legal interest.

ERROR to the Circuit Court of Montgomery.

Tried before the Hon. John D. Phelan.

John McCall, the intestate of the plaintiff, as the evidence tended to show, took possession of certain unoccupied lands and premises, without any claim of right or title thereto; but because, as he said, "he knew the titles were destroyed, and that in consequence he believed the true owner could never recover them." Afterwards, McCall was sued for the possession of the lands by one Pryor, and, during the pendency of

the suit, Capehart & Harbin, who claimed title to said lands and premises under a purchase made by them at sheriff's sale, with the knowledge of how McCall's possession was acquired, covenanted and agreed with him, that if he would deliver to them the possession of said lands and premises, they, in consideration thereof, would pay to him five hundred dollars, and would further save harmless and indemnify him against all claims for rent of said lands, and particularly against all liability to said Pryor for rents, in the suit which he had brought against him. The said sum of five hundred dollars was paid to McCall, and Capehart & Harbin were put in possession of the lands. The suit of Pryor was afterwards determined, in which he recovered the possession of said lands and ten hundred and forty dollars damages, which judgment was satisfied by McCall before the institution of this suit. This suit was instituted by McCall's administrator, to recover for an alleged breach of said covenant in not paying said sum of ten hundred and forty dollars.

The court charged, 1. That if McCall had taken possession of said lands when they were unoccupied, without any right or title to the same, and for the purpose of keeping the true owner out of the possession, he was a trespasser; and if he sold his possession as a trespasser, the contract of sale was void, and this, notwithstanding the purchaser may have known at the time of the contract all the facts relating to his possession.

2. That if the suit for the recovery of the lands had been commenced by Pryor, and was pending at the time of the execution of the covenant sued on, the same was void for maintenance.

These charges were excepted to, and are here assigned for error.

Thos. Williams, for plaintiff in error.

1. A person in possession of lands, without any title either legal or equitable, may for any consideration paid, or without consideration, agree to surrender that possession to one claiming title, and such agreement will not be against public policy; and the agreement so to surrender possession will not be champertous, although a consideration be paid for such

surrender, and a covenant to indemnify against rents, because 1st. An agreement to surrender possession of lands, the subject of a suit pending, by one claiming no title to one claiming title, cannot be said to be a bargain for and sale of the lands or any part thereof; and this is necessary to constitute champerty. Story on Contracts p. 511, § 581, and authorities there cited; 2d. Because a man has a right to buy his peace, and therefore one claiming title cannot, by paying a trespasser to surrender to him the possession, be said to "foment litigation and pervert the objects of the law," although a third person may be prosecuting his suit for the recovery of the same lands. See same page and section of Story on Contracts.

2. Such covenant is not maintenance: 1st. Because the defendants had an interest, and claimed title to the lands under and by virtue of a sheriff's sale to them; and it is not unlawful to maintain in such a case. Story on Contracts, p. 508, § 578, p. 509, § 579; and see Findon v. Parker, 11 Mees. & Welsby 675, 682; 3 Cowen 647; indeed, a supposed interest is sufficient to justify the party in maintenance, however small that interest may be, and whether certain or uncertain, vested or contingent. Story on Contracts, p. 510, § 579, before cited, and the authorities there referred to. In the case at bar, the defendants state in their covenant, under their hands and seals, that they claim the lands, having purchased the same at sheriff's sale, sold as the property of Henry Hall, and the lands are said to be known as the lands of Hall; and this is binding on defendants. See 3 Cowen 647, before referred to.

3. But there must be an agreement to maintain the suit, either by advancing money for that purpose, or an agreement to pay costs. See the authority before referred to. In the case at bar there is no such agreement; the agreement on the part of McCall was, to surrender possession by a particular time, in consideration of which promise or covenant defendants paid him $500, and covenanted to protect him against paying rents to any one, particularly to Pryor, and released McCall from liability to pay rents to them, defendants, who claimed to be the true owner. Here is no agreement to pay costs, or to advance money to defend the suit,

and this is necessary. See the authority above referred to. And a covenant to indemnify against costs and damages is not maintenance. See Campbell v. Jones, 4 Wend. 306; Williamson v. Henly, 6 Bingham 299; 19 Eng. Com. Law Rep. 87.

T. J. JUDGE, for defendants in error.

1. As between McCall and defendants, defendants were the owners of said lands and premises; they, defendants, having and claiming title to the same, and McCall being, as he acknowledged, an open trespasser in the possession of them; he having taken possession for no laudable purpose. There was no sufficient consideration then to sustain the promise made by defendants to McCall, to indemnify him; besides, it is against public policy, to permit one in the unlawful possession of property to stipulate for payment for its restoration to its true owner. "An enlightened morality and the dictates of honesty denounce such a contract, and the law cannot lend its sanction to enforce it." See McCaleb, use, &c. v. Price, 12 Ala. Rep. 753, which in principle is decisive upon this point; see also, Duncan, use, &c. v. Hall, 9 Ala. 128.

2. The covenant between the parties was void also, on the ground of maintenance. McCall was a naked trespasser; a suit was pending against him on account of his said trespass; the stipulation was, to save him harmless from the consequences of said suit; the effect of which was to maintain him unlawfully in the same.

GOLDTHWAITE, J.—The case of Gillespie v. Dew, 1 Stew. 229, and Blevins v. Cole, 1 Ala. Rep. 210, are directly to the point, that the owner of lands may maintain trespass against a wrong doer, where there is no adverse possession, and the current of American authority is to the same effect. Van Brunt, *et al.* v. Schenck, 11 John. 385; Bush v. Bradley, 4 Day, 306; Con. Society v. Baker, 15 Verm. 119; Dobbs v. Gallidge, 4 Dev. & Bat. 68; McGran v. Bookman, 3 Hill S. C. 265; Leadbetter v. Fitzgerald, 1 Pike, 448; Cohoon v. Simmons, 7 Ired. 189. The charge of the court, therefore, as to the facts, which would make McCall a trespasser, was correct.

The charge of the court, that if McCall acquired possession of the lands specified in the contract by a trespass, and sold such possession as a trespasser, that the covenant sued on was illegal and void, was also correct. By the terms of this contract, McCall, the intestate of the plaintiffs in error, stipulated to deliver the possession of certain lands to the defendants in error, who claimed title under a purchase at sheriff's sale, in consideration of a certain sum paid by them at the execution of the covenant, and for the additional consideration, that they should save harmless and indemnify him from all claims or liability to rent for said lands, to any person, and particularly to one Pryor, who had instituted a suit against him for the recovery of said land. There can certainly be no doubt, that if one who had wrongfully acquired the possession of property, was to stipulate, for a given sum, for restoring it to the owner, the consideration of a contract of this description would be held insufficient, and the contract itself void. McCaleb v. Price, 12 Ala. Rep. 753. The restoration, under those circumstances, would be an act which morality requires, and which the law would compel, and could no more be held to constitute the basis of a consideration, than an agreement to discharge a debtor from the whole debt, in consideration of the payment of a part. If, therefore, the defendants in error, as against McCall, are to be considered as acquiring the right to the lands by their purchase at sheriff's sale, it is clear, that the covenant could create no legal obligation on them.

If, however, by the terms of the covenant, the defendants in error, as against McCall, are not to be considered as the true owners of the land, then the only question raised by that portion of the charge we are considering, is, as to the effect of a contract made by a trespasser, for the transfer to a third person, of the possession which he had tortiously acquired. We all agree, that a contract of this character cannot be sustained. We can view it in no other light than as a contract, on the part of the seller, to dispose of that which he has wrongfully acquired, and which he has no right to retain; on the part of the purchaser, it is buying the privilege to continue a trespass. A court of justice will not lend its aid to enforce a contract of this description. Toler v. Armstrong, 11 Wheat. 258; McCaleb v. Price, *supra*.

That the defendants in error may have known, at the time they entered into the covenant, the manner in which McCall acquired the possession of the land, can have no influence on the validity of the contract.

The charge given by the court, that if the suit of Pryor against McCall was pending at the time the covenant was entered into, such covenant was void, on the ground of maintenance, cannot be sustained. Maintenance is the officious assistance, by money or otherwise, proposed by a third person, to either party to a suit in which he himself has no legal interest, to enable them to prosecute or defend it. Story on Con. § 578. But the doctrine of the common law as to maintenance does not apply to persons who either have any legal interest in the suit promoted by them, or who act under the *bona fide* belief that they have. Ib. § 579. Conceding that the agreement to indemnify McCall against the damages which the plaintiffs in the suit might recover against him, was assisting him in his defence, still, if the persons rendering the aid acted under the honest belief, that they were interested in the result of the suit, and not for the purpose of fomenting litigation, it would not have been maintenance. Findon v. Parker, 11 Mees. & W. 675; Story on Con. § 579. The covenant does not upon its face show the character of McCall's possession, and *non constat* that the defendants in error, in assisting him, may not have been sustaining their own title. In assuming that both the intention and the act, which are necessary to constitute maintenance, were conclusively established by the covenant, the court erred; and as it is impossible to say, from the record, on which ground the jury determined against the validity of the contract, and as the facts which went to its validity were alone for them to determine, it follows, that the error of the court may have prejudiced the plaintiff.

The judgment must be reversed, and the cause remanded.

TILLER *vs.* SHEARER.

1. A declaration in *case* for wrongfully suing out an attachment, is bad on demurrer, if it does not specially deny the ground set forth in the affidavit for suing out the attachment.

ERROR to the Circuit Court of Sumter.

Tried before the Hon. Turner Reavis.

This was an action on the case brought by plaintiff in error against the defendant, for wrongfully and vexatiously suing out an attachment against the plaintiff ancillary to a suit at law. The affidavit which is set out in the declaration, discloses that the ground set forth for suing out the attachment was, that "the said James Tiller was about to remove out of this State." The declaration does not contain an averment specially denying the fact stated in the affidavit, that plaintiff was *about to remove out of the State.* There is a general averment in these words, "and the plaintiff avers that all said defendant's action respecting the suing out of said attachment, was wrongful and vexatious." To this declaration there was a demurrer, which was sustained by the court, and this is assigned for error.

WM. H. GREENE, for plaintiff in error.

BLISS & BALDWIN, *contra.*

The demurrer was properly sustained. The declaration sets out no sufficient cause of action. It does not deny that the defendant was "about to remove out of the State." The averment that "all the said actions were wrongful and malicious," is not sufficient, Gould's Pleading, chap. 4, §§ 7, 24, 29; 1 Chitty's Pleading, 214; 1 M. & S. 441; 3 ib. 114; 9 Johns. R. 291; 2 ib. 12; 12 Ala. 567; 13 ib. 828.

PHELAN, J.—It is essential to the goodness of a declaration in *case*, for wrongfully suing out an attachment, that it should contain an averment denying specially the truth of the ground for an attachment, set forth in the affidavit. Here the ground set forth in the affidavit was, that "the said James

Tiller was about to remove out of the State." This is not specially denied. There is a general averment that "all said defendant's action respecting the suing out of said attachment, was wrongful and vexatious," which the court below held not to be sufficient, on demurrer to the declaration. In this there was no error. See Gould's Pleading, § 24 to 29; 1 Chitty P. 214.

The judgment of the court below is affirmed.

HOOPER *vs.* EDWARDS.

1. Declarations inseparably connected with material acts, which they serve to elucidate and explain, are admissible evidence as part of the *res gestae.*
2. But declarations made after suit brought, and not connected with any fact or act whatever, are not admissible evidence for the party making them.

ERROR to the Circuit Court of Russell.

Tried before the Hon. E. Pickens.

The plaintiff commenced an action of assumpsit against Bryant S. Mangham, and pending the suit, sued out an ancillary attachment, which was levied on certain property; and Laxla Edwards, the defendant in error, was also served with a writ of garnishment. The attachment was issued on the 24th of November, 1848, and the defendant summoned as garnishee on the 30th of the same month. The garnishee appeared and answered, denying any indebtedness to Mangham, and further denying that he had any property of Mangham's in his possession. This answer was contested, and an issue was made up under the statute, between the plaintiff in the attachment and Edwards, the garnishee. Upon the trial of this issue, it appeared that the garnishee had in his possession, at the time of the service of the writ, three slaves, Dan, Franky and Henry, a road wagon and several other articles of property, that had belonged to the defendant in the attachment. The garnishee then proved that he was a deputy sheriff of Russell county, and as such, had in his hands sev-

eral executions against Mangham, which, however, had not been levied on his property; that in March, 1848, he had bought Mangham's land, and hired his negroes, about eight in number, and that on the night of the 25th of November, 1848, Mangham left the county of Russell clandestinely, and carried with him all his negroes, except the boy Henry, who had been previously levied on by Edwards, by virtue of an attachment issued at the suit of one Reese against Mangham. Edwards, ascertaining that Mangham had left, carrying with him his slaves, employed one Thornton to pursue him. Thornton overtook him the next day, being Sunday, about sixty miles west from the place he had left in Russell county, and then purchased from Mangham the two slaves Dan and Franky, valued at twelve hundred dollars, for and on account of Edwards; and it was further shown that the contract was, that Edwards should pay off the executions he had in his hands and some others against Mangham. Thornton, the agent of Edwards, returned to Russell county, and Edwards ratified the contract thus made. It also appeared, that the slave Henry had been sold since the service of the garnishment, under an execution in favor of Reese, which had been issued on the judgment rendered in the attachment suit, and after satisfying this debt, the residue of the purchase money had been applied by Edwards to other executions in his hands. It further appeared, that the road wagon and the other articles of property belonging to Mangham, had been sold by Edwards, and the proceeds applied in the same manner, but there was no evidence that the wagon and other property had ever been levied on by virtue of any process.

The witness Thornton was asked to state the object Edwards had in sending him after Mangham. The witness answered, that Edwards told him that his object was, to secure himself from liability which he had incurred as deputy sheriff, by giving Mangham indulgence on executions he had in his hands against him, and which executions he then placed in his agent's hands. The plaintiff objected to this answer of the witness, but his objection was overruled, and the plaintiff excepted.

The garnishee also introduced James Johnson as a witness, who testified that in the year 1849 he had a conversation

with Edwards, the garnishee, in which Edwards said he would pay off a judgment in favor of one Crews, for about four hundred dollars, against Mangham, in the event there was any surplus of Mangham's funds remaining in his hands to pay it. It also appeared that Mangham had been indulged on this judgment by Crews, and that the execution had lost its lien, but that this debt to Crews was one of the debts that the garnishee, Edwards, agreed to pay, in consideration of the purchase of the two slaves Dan and Franky. The plaintiff objected to what the garnishee said to the witness in 1849 as evidence, but his objection was overruled, and the plaintiff excepted.

The instructions of the court to the jury were also excepted to by the plaintiff, but it is not deemed material to state them.

HOOPER, for plaintiff in error.

BELSER, *contra.*

DARGAN, C. J.—We think it was clearly admissible to prove what Edwards said to Thornton, at the time he gave him the executions and appointed him his agent to pursue Mangham. What he then said was not mere declarations, or admissions, unaccompanied by acts material to be considered on the investigation of this cause. But on the contrary, they were declarations inseparably connected *with material acts*, and served to elucidate and explain them. Our reports abound with decisions showing that such declarations are admissible as part of the *res gestae.* Williams v. Shackelford, 16 Ala. 318; Tompkies v. Reynolds, 17 Ala. 109; Mawhinney & Smith v. Thompson, ib. 362; McBryde & Wife v. Thompson, 8 Ala. 650; Yarborough v. Moss, 9 Ala. 382; Babcock v. Huntington, 9 Ala. 869.

But we think it equally clear that the court did err, in permitting the witness Johnson to state what Edwards, the garnishee, said to him in 1849, respecting his intention to pay the debt of Crews if there should be left in his hands a surplus of the funds of Mangham. What Edwards then said was a mere declaration, made after this suit was pending, and not connected with any fact or act whatever. To allow such

declarations, would be to enable parties, *even after suit brought*, to make testimony by their own declarations. No rule of law will justify the admission of such declarations.

As the judgment must be reversed for this error, we do not deem it necessary to examine the instructions given by the court to the jury with particularity, for the case is of that description that it is by no means certain that upon another trial it will be presented in exactly the same phase. We however think it not improper to suggest the proper inquiries that should have been submitted to the jury, according to the evidence as contained in this bill of exceptions.

If the jury should believe, that the contract entered into between Mangham and the agent of Edwards is valid, according to the principles heretofore decided in this case, they then should inquire and ascertain, what debts due by Mangham Edwards assumed to pay in consideration of the two slaves, Dan and Franky. They should further inquire, whether Edwards agreed to pay these debts, irrespective of the value of Henry, whom Edwards had in his possession by virtue of a levy made under the writ of attachment in favor of Reese; or whether it was the understanding that the value of Henry should be applied to those debts, and that in consideration of the other two slaves, Edwards was to pay the residue of the debts left unpaid, after applying the value or proceeds of Henry to their payment. If they should find that the contract was, that Edwards agreed to pay the debts irrespective of Henry's value, then he would be liable to the plaintiff to the extent of Henry's value; but if he agreed to pay the debts, or the balance of them, after applying the proceeds of Henry to their extinguishment, then he would not be liable on account of Henry. They should also inquire, whether the contract embraced the wagon and other articles of property; if it did not, then Edwards must be liable for the wagon and other articles of property, unless they were levied on and sold to satisfy other debts than those agreed to be paid by Edwards. I have suggested the foregoing as the points of inquiry that will probably arise upon another trial. The testimony, however, may vary them, and the court must be governed by the evidence as it shall appear upon the trial.

Let the judgment be reversed, and the cause remanded.

LANGDON ET EL. *vs.* RAIFORD.

1. A constable may levy an execution issued by, and returnable before, a justice of the peace.
2. When an attachment, issued by and returnable before a justice of the peace, is levied by a constable on the defendant's land, and after the rendition of judgment in the suit, an execution issued thereon is levied on the same land in default of personal property, the lien of the judgment creditor relates back to the date of the levy of the attachment.
3. When a motion is made by the plaintiffs in a judgment to have certain moneys in the hands of the sheriff applied to the satisfac'ion of their judgment, which motion is entertained by the court and decided against them, the matter becomes *res adjudicata*, and the action of the court is conclusive until reversed, or otherwise set aside; and the plaintiffs cannot bring assumpsit against the sheriff for the money.

ERROR to the Circuit Court of Perry county.
Tried before the Hon. John D. Phelan.

Assumpsit by plaintiffs in error against the defendant, who was sheriff of Perry county, "to recover the sum of $99 $\frac{12}{100}$, the surplus arising from the sale of William A. Strong's land under a *venditioni exponas*, issued upon a judgment rendered in the County Court of Perry, in a certain case of attachment, wherein John H. Reid was plaintiff, and said Strong was defendant, being money had and recived by defendant for the use of plaintiffs." The defendant pleaded the general issue; verdict and judgment for him. It appears from the bill of exceptions, that two attachments in favor of the plaintiffs against said Strong were issued by a justice of the peace, for fifty dollars in each case, which were levied by a constable on the 18th December, 1848, on the defendant's land, and judgments were rendered in both cases by the justice in favor of the plaintiffs, on the 2d July, 1849. An attachment in favor of John H. Reid against said Strong, was levied on the same land by the sheriff, on the 21st November, 1848, and after the rendition of judgment, the land was sold under a *venditioni exponas* by the sheriff. After satisfying the judgment of said Reid, the balance of 99 $\frac{12}{100}$ remained in the hands of the sheriff, which he paid to one B. F. Parsons, who had also sued out an attachment against Strong, which was

levied on the same land on the 22d December, 1848, and judgment being afterwards rendered in his favor, a *venditioni exponas* had issued thereon, and was in the sheriff's hands at the time of the sale. The defendant proved that no execution, or any other process had issued on said plaintiffs' judgments, and no step had been taken by them to subject the land, though they had demanded the money from the sheriff. It was also shown, that previous to the institution of this suit, the plaintiffs had made a motion in the Circuit Court against the sheriff, to have the money now sued for applied to the satisfaction of their judgment, which motion the court decided against them. The court charged the jury, that if they believed all the evidence, they must find for the defendant; to which charge plaintiffs excepted.

A. B. Moore, for plaintiffs in error.

1. The first question that arises in this case, is, can an action of assumpsit be maintained against the defendant, under the facts of this case? To show that it can, see Wilson v. Seargent, 12 Ala. Rep. 778; 17 Mass. 563; Thompson v. Merriman, 15 Ala. Rep. 166; 10 Peters, 156–7; 13 ib. 263; Hitchcock v. Lukens, 8 Porter, 333.

2. The attachment of plaintiff, having been levied on the lands of the defendant prior to the attachment of Parsons, created a prior lien in their favor, and entitled them to the surplus in the hands of Raiford, sheriff, after the payment of Reid's attachment. 3 Stewart, 433; 12 Ala. Rep. 743.

3. When a lien is expressly created by law in favor of a party, there must be some act done by, or some laches, or neglect, on his part, from which a waiver, or abandonment of his lien may be inferred, before it can be said that he has lost his lien. 12 Ala. Rep. 838: 4 S. & Marshall, 579; 1 Howard, 48.

4. That a constable has a right to levy an attachment, may be inferred from a fair construction of the several statutes to be found in Clay's Digest, p. 55, § 5; ib. 358, §1; ib. 359, §§ 4–5; ib. 364, §7. See also Toulmin's Digest, 512, § 15; 15 Ala. Rep. 721.

5. If a constable has a right to levy an attachment on personal property, he may levy it upon lands, as the statute re-

quires the levy to be made in the same manner. Clay's Dig. 60, § 29.

6. The principle of *res adjudicata* does not apply to decisions of courts made in a summary way. 3 Ph. Ev. C. & H.'s Notes, Part 2, 825.

7. In this case there was no adjudication, as the record shows that the court refused to hear the motion.

The action of the court on the motion, unless the case had been heard on its merits, will not bar this suit.

The refusal to hear the motion was equivalent to a demurrer by Raiford, and that sustained by the court, which would not bar this suit. 3 Ph. Ev. C. & H.'s Notes, 2 Part, 835; 1 Blackford, Stephens v. Dunbar, 56.

I. W. Garrott, for defendant.

1. The plaintiffs show in their bill of exceptions, that before the commencement of this suit, they made a motion before the Circuit Court of Perry, to have the same identical money for which this action is brought, applied to the satisfaction of their judgments, which motion that court refused to grant. If plaintiffs have any right to the money, this motion was their remedy, and the court having jurisdiction having decided against them, they are bound by its judgment. Denham *et al* v. Harris, 13 Ala. Rep. 465; Thompson v. Merriman, 15 ib. 166.

2 Plaintiff's attachments were levied by a constable upon land, and *a constable cannot levy an attachment;* because,

1st. There is no statute which authorizes such levy.

2d. The statute which prescribes the form of the writ, requires it to be directed to "any sheriff of the State of Alabama." Clay's Digest, 55, § 6; ib. 63, § 38. A constable, therefore, could not execute such writ. In last statute, word "may" means "must." 9 P. 390, 395–6; Gresham v. Leverett, 10 Ala. Rep. 384.

3. Sheriffs are directly empowered to execute attachments and writs of forcible entry and detainer, issued by justices of the peace. Clay's Digest, 359, § 8.

4. Plaintiffs having only judgments before a justice of the peace, have no lien, because the statute expressly provides that judgments before a justice of the peace shall not bind

land. Clay's Digest, 205, § 17. And the only way by which land can be subjected to a judgment of a justice of the peace, is through the Circuit Court, by virtue of the statute found in Clay's Digest, 207, § 31.

5. The defendant sold the land as well under the judgment of Parsons v. Strong, as of Reid v. Strong, and was required by the process in his hands to have said moneys before the court, to satisfy the same. The money, therefore, was in the custody of the law, and could not be sued for in this action. Denham *et al.* v. Harris, 13 Ala. Rep. 465, 468.

6. The plaintiffs obtained their judgments on the 2d July, 1849, but caused no execution to issue thereon, nor did they take any step to subject the land thereto. Reid and Strong obtained judgments at the July Term, 1849, of the County Court of Perry, which by law is held on the 4th Monday of that month. They caused process to issue on their judgments, and had the land sold to satisfy them; and *after* the land was thus sold, and the proceeds in the hands of the sheriff, they (the plaintiffs) are for the first time heard to claim the money. Under such circumstances, if they had any lien by virtue of the levy of their attachment, they have lost it by their own laches. Campbell v. Spence *et al.* 4 Ala. Rep. 543.

7. Although the action of assumpsit lies to recover money which *ex æquo et bono* belongs to another, yet the money must have been received under circumstances which show some *default* on the part of the defendant, from which the law will imply a contract. This action only lies on a contract, either expressed or implied. 17 Ala. Rep. 51; 1 Ch.'s Pl. 98; Ch. on Contracts, 184.

When the sheriff received the money, he took it under the process in favor of Reid & Parsons, and had it for them, having up to that time no notice of the claim of plaintiffs. He, therefore, had no contract or duty to perform to them, in consequence of having received this money. The claim of plaintiffs *after* he thus received the money, cannot raise a promise in their favor. 2 Richardson, S. C. R. 102; 3 U. S. Digest, 435, § 186.

CHILTON, J.—The first question which demands consideration is, whether a constable can levy an attachment is-

sued by and returnable before a justice of the peace. That the constant practice for years has been for such officers to levy attachments of the kind, is undoubtedly true. Indeed, I know of no case where the right has been questioned. But to deduce the right from the several statutes upon the subject, I am free to confess, is a matter of some difficulty.

By the third section of the act of 1807, it was made the duty of the several constables of the respective counties, "to serve all warrants, summonses, executions and other process to them directed by lawful authority," &c. Clay's Dig. 364, § 7. By the fifth section of the act of 1814, the constable is required to "endorse on the back of all process, how he has executed the same;" and by another act, passed the same year, the justices are required "to direct their process to the officer whose duty it is to execute the same." Clay's Dig. 359, §§ 4, 5. The fourteenth section of the statute last referred to, requires that "every warrant, attachment, summons, subpœna or other process, issued by a justice of the peace, shall be returnable to a day certain, giving a reasonable time for attendance," &c. ib. § 6.

By the fifth section of the act of 1833, (Clay's Dig. 55, § 5,) justices of the peace have exclusive jurisdiction over attachments, where the sum sworn to be due does not exceed fifty dollars. By the second and fourth sections of this act, they have power to issue attachments for sums over fifty dollars, but they are made returnable to the Circuit or County Court; and in respect to attachments so returnable, it is clear that the sheriff should execute them. From these several statutes, and several others which seem to point to the same conclusion, we think it may be safely inferred that the legislature intended, that the constable should levy attachments which were exclusively within the justice's jurisdiction. The fact, that by the act of 1829, the constable is allowed a fee of seventy-five cents "for levying an attachment," (Clay's Dig. 240, § 3,) clearly shows that such was the legislative interpretation of the previous acts. But there are other and subsequent statutes which introduce the difficulty. The sixth section of the same act which gives justices exclusive jurisdiction of attachments for sums under fifty dollars, declares that "to prevent errors in issuing attachments, the writ shall be in the

following form: *The State of Alabama. To the sheriff of —— County*, greeting," &c. Clay's Dig. 55, § 6. And by the act of 1835, (ib. 63, § 38,) "all original or judicial attachments and summonses of garnishments are required to be directed, 'To any sheriff of the State of Alabama'." Again: by the previous act of 1823, it was made unlawful for the sheriff or coroner to execute process in civil cases, issued by any justice of the peace, *except attachments*, and by the act of 1826, precepts in forcible entry and detainer were also excepted. Clay's Dig. 359, § 8. These acts, construed literally, would embrace *all* attachments, and require them to be executed by the sheriff. We think, however, upon a careful examination of the several statutes, that they were not designed to have so extended an operation, and that the apparent conflict may perhaps be reconciled by the fact that attachments issued by justices, *but returnable to courts of record*, must be directed to the sheriff, &c., and executed by him; and that such attachments only were in the mind of the legislature, as were so returnable. In Alford v. Johnson, 9 Porter, 320, it was held, that the act of 1836, requiring process to be directed "to any sheriff," did not apply to attachments issued by a justice of the peace.

It is, however, sufficient that taking the whole body of our statutes together, they leave the right of the constable to levy in doubt, since we should be unwarranted, unless required by the most unequivocal expression of the legislative will, in overturning a practice which has uniformly, so far as we are advised, obtained in this State, and upon which the title to much property doubtless depends; a practice too, which seems to have been sanctioned by our predecessors as early as 1831, in the case of Carey v. Gregg, 3 Stew. Rep. 433. That was the case of a motion by a sheriff against his deputy, for failing to pay over money collected by the latter on executions placed in his hands from a court of record, which had been levied by him on a negro slave. The deputy, who was also a constable, defended upon the ground that attachments and executions from a justice of the peace had been levied by him as constable, half an hour before the fi. fa's. from the court of record came to his hands. The court held, that the attachments, having been levied before the execution came to the officer's hand, had the prior lien. The right of the con-

stable to levy the attachments, though not made a question in the cause, is certainly involved in the decision.

2. The next question is, whether the levy by the constable upon the land of the defendant, created a lien paramount to the lien of Parsons' execution, which was subsequently levied by the sheriff. The act of 1837, (Clay's Dig. 60, § 20,) authorizes all original attachments to be levied on land, and it is well settled that a lien attaches from the date of the levy; inchoate, it is true, but capable of being perfected by the rendition of judgment, and the issue of such process as may render it effectual. If the constable levy the attachment on land, and judgment be thereupon rendered by the justice, such levy can only be made available by the issue and levy of an execution on the same land, in default of personal property of the debtor; in which event, the levy and the proceedings had before the justice, are to be certified to the Circuit Court, and if found regular, an order of sale issues to the sheriff. Clay's Dig. 207, § 31. Upon a sale of such land, we think it very clear that the lien would date, not from the levy of the execution. but would relate back to the levy of the attachment. This proceeding would also furnish record evidence of the levy upon, and sale of the land, which the justice could not order, his not being a court of record. That the lien of the attachment dates from the levy, and is not affected by the levy of an execution which had no lien before the attachment was levied, see Pond v. Griffin, 1 Ala. Rep. 678.

3. But it is argued that the lien, which was commenced by the levy, was never perfected by the Langdons, they having failed, after the rendition of judgment, to issue execution, so as to make a levy and obtain an order of sale, as required by the statute.

The answer to this is, that the land was sold by the sheriff under a *venditioni exponas* issued in a suit commenced by an attachment, which had been levied before the attachment of the Langdons, and consequently they could only proceed for the surplus, after satisfying the older lien, which surplus it appears the sheriff had in court. Whether in such case it would not be incumbent on them to show, by a return of the constable upon an execution, that there was not personal property

of the debtor to satisfy it, as in that event only they could have perfected their lien, had no sale of the land been made by the sheriff, is a question which in the present posture of this cause, we need not decide, because the view we take of the only remaining question in the cause, renders its decision unnecessary.

4. The bill of exceptions shows, that the plaintiffs proved that they had made a motion at a previous term of the Circuit Court of Perry, and before the commencement of this action, to have the same money now sued for by them, applied to the satisfaction of their judgments against the defendant, Strong; but that said motion was refused by the presiding judge. We do not understand from this language, that the judge refused to entertain the motion, but that having heard it, he refused the application of the money as moved for by the plaintiffs. The money moved for was in the custody of the law, brought into court by its officer, in obedience to its mandate, and it has long been the established practice in such cases, for the court—most usually upon the application of the sheriff, but not unfrequently upon the application of a party having a lien upon the fund created by law, all parties interested being duly notified—to order the fund to be paid out according to the priority of the respective liens. See Denham & Waford v. Harris, 13 Ala. Rep. 465, and cases cited; Thompson v. Merriman, 15 ib. 166; Campbell v. Spence, 4 ib. 543.

The court having a right to hear and determine the motion, and having taken jurisdiction and adjudged against it, the plaintiffs, by their bill of exceptions, show that the matter which they seek by this action to re-litigate is *res adjudicata*, and thus justify the court in giving the charge excepted to, namely: that if the jury believe the evidence, they should find for the defendants. If the plaintiffs had a legal lien, the court had, upon their application, jurisdiction to decide upon it, and has decided against them, which decision must conclude them until it is reversed, or otherwise set aside. If they had no lien, then this action falls to the ground.

It results that there was no error in the charge, and that the judgment of the Circuit Court must be affirmed.

STEELE *vs.* WEAVER'S EXECUTORS.

1. A report of the insolvency of an estate which is in the name of both the executors is sufficient, although it is signed by one of them only, and verified by his oath alone; the report having been adopted by the other executor, and having been treated as a sufficient report by the court, in ordering a sale of the decedent's lands.
2. When an estate was reported insolvent previous to the act of 1843, but no progress was made in the settlement until afterwards, the subsequent proceedings must be regulated by that act.
3. But the creditors in such case would only be bound to file their claims against the estate within the time prescribed by the court under the previous law, and the right to file claims would also be limited to the time so prescribed.
4. The law previous to the act of 1843 made no provision for contesting claims between the creditors; when, therefore, the settlement of an estate, which was reported insolvent previous to the passage of that act, is to be made through an administrator *de bonis non* under the act, the common law rule would prevail, that written objections to claims should be filed within a reasonable time after the appointment of an administrator *de bonis non*.

ERROR to the Court of Probate of Madison.

Fleming Jordan, executor, and Martha H. Weaver, executrix of George I. Weaver, deceased, filed their report of the insolvency of their testator's estate, in the office of the Clerk of the County Court of Madison, on the 1st November, 1841. The report is signed by Jordan only, and verified by his affidavit. It was not recorded at the time, but was only filed among the papers of the cause; nor was any written memorandum made on it to show when it was filed, or that it had been filed at all.

On the 9th November, 1841, on the petition of the executor, Jordan, the Orphans' Court made an order for the sale of the testator's lands, to pay the debts of the estate, and appointed commissioners to make the sale. There does not appear to have been any proceeding had under this order. The next entry in the record sets forth the execution of a new bond by Jordan and Bone and wife, (Mrs. Weaver, the executrix, having intermarried with Bone,) on the 1st January, 1844, agreeably to notice given the 5th December, 1843.

On the 27th February, 1845, the court made an order requiring the creditors of Weaver to file their claims against

his estate, as against an insolvent estate, on or before the 1st September next thereafter; and a number of claims were filed against the estate within the time prescribed. The claims of the plaintiff in error were filed on the 15th June, 1850, which, it is stated, did not accrue until the 12th and 18th February, 1850.

Upon this state of facts, Steele objected to proceeding with the settlement as that of an insolvent estate, but his objection was overruled. He then moved the court to permit the creditors to elect an administrator *de bonis non*, which motion also the court refused. The plaintiff in error excepted to these refusals of the court, and now assigns them for error.

D. C. HUMPHREYS and WM. COOPER, for plaintiff in error:

1. The report of insolvency, signed and sworn to by Jordan only, was insufficient. It should have been signed and sworn to by both, Lambeth & Wife v. Garber et al. 6 Ala. 870; Caruthers & Kinkle v. Mardis's Adm'rs. 3 ib. 599. No action of the court was ever had upon the report. It was not recorded, nor was any memorandum made to show that it was filed at all.

2. But if the report is held to be sufficient, then the estate should have been settled under the act of 1843. It comes precisely within the rule laid down by several decisions of this court, Boggs's Adm'r. v. Branch Bank at Mobile, 12 Ala. 494; 10 ib. 915; 8 ib. 457; 7 ib. 923. See also McBroom v. McBroom, at January Term, 1851.

JAMES ROBINSON and R. C. BRICKELL, *contra:*

1. The estate was reported insolvent under the act of 1806. Aikin's Digest, 151, § 2. The proceedings conform precisely to the provisions of that statute. The executor exhibits to the court an account of the estate, real and personal, and of the debts owing by the testator. Upon this report, the court acts as required by the statute, and orders a sale of the real estate. No order or decree of the court declaring the estate insolvent was required. If, from the account exhibited by the executor or administrator, it appeared to the court that the estate was insolvent, the court was required to order a sale of the real estate, and then to notify the creditors of the time

and place appointed for receiving and auditing their claims, Aikin's Digest, 151, § 2; ib. 154, § 7. The court had jurisdiction over the estate as insolvent, whenever the executor so reported it, and the court was satisfied of the truth of the report, Clarke v. West, 5 Ala. 117. That the court was satisfied of the truth of the report appears from its action, in ordering a sale of the real estate, as required by the statute. The report appearing of record, and the Orphans' Court having treated the estate as insolvent, the Court of Probate properly overruled the plaintiff's first objection.

2. The plaintiff's motion to elect an administrator *de bonis non* was also properly refused. No notice was given to the creditors to attend for any such purpose, as seems to be contemplated by the statute of 1843, Clay's Digest, 195, §§ 5, 6.

PHELAN, J.—This estate was reported insolvent by the executors on the 1st November, 1841, and that gave the judge of the Orphans' Court jurisdiction over it, as an insolvent estate, Clarke v. West, 5 Ala. 117. The objection that only one of the executors signed the report, we do not consider fatal to its sufficiency. It was in the name of both, and verified by the oath of one. The judge of the Orphans' Court treated it as a sufficient report, by ordering a sale of the lands of the deceased. A new bond was required afterwards to be given, and was given by both of the executors, which, if necessary, we would hold to be an adoption by both of the act of one in reporting the estate insolvent. We therefore hold, that the court below properly decided to proceed with the matter, as of an insolvent estate, against the objection of the plaintiff in error.

After the estate was reported insolvent, and a sale of the lands ordered on the 9th November, 1841, nothing more seems to have been done towards the settlement of the estate, until the 1st January, 1844, when a new bond was given, agreeably to notice; and on the 27th February, 1845, an order was made, for creditors to file their claims on or before the 1st September, and for publication of the order for six months. In the case of Boggs's Adm'r. v. Branch Bank at Mobile, (12 Ala. 494,) this court has decided, that when an estate was declared insolvent previous to the act of 1843, but

no progress was made in the settlement until afterwards, the subsequent action of the court should be regulated by that act. We consider this case in the court below to be in that condition, and the rule laid down in the case last above cited must govern. No progress was made in the settlement of the estate, at the passage of the act of 1843 "to amend the laws now in force in relation to insolvent estates," (Clay's Digest, 192, *et seq.*,) although it had been previously reported insolvent; and the subsequent action of the Court of Probate must be regulated by that act. See also Martin v. Baldwin, 7 Ala. 923; McLaughlin, v. Nelms, 9 ib. 925; Branch Bank v. Steele, 10 ib. 915. It follows that the Court of Probate erred, in deciding to proceed with the settlement of the insolvent estate under the old law, against the objection of the plaintiff in error. For this error, the decision of the court below on this point is reversed, and the cause remanded.

The proceedings of the Court of Probate, in making the order, and giving notice to creditors to file their claims, as against an insolvent estate, agreeably to the law as it stood previously to 1843, was proper. This should have been done within a reasonable time, if not immediately after the estate was reported insolvent in 1841; and inasmuch as we are of opinion, under the authority of cases already decided by this court, (see 5 Ala. 117; 7 ib. 923; 10 ib. 915,) that no decree of insolvency was necessary, under the old law, to bring the estate fully within its provisions as an insolvent estate, it would not be consistent to determine that creditors should be held to the duty of filing their claims agreeably to the act of 1843; that is, within six months from *the report of insolvency*, regarding that as standing in the place of a *decree of insolvency*. They would, in such case, only be bound to file their claims within the time prescribed by the court under the previous law, not less than six, nor more than eighteen months, and the right to file claims would also be limited to the time so prescribed.

The notice having been given for creditors to file their claims under the old law, and the claims having been filed accordingly, the act of 1843 takes the case up at that point, and all further proceedings must be had under it, Steele v. Knox, 10 Ala. 608. The first thing now to be done is, for

the Judge of Probate to appoint a day for the executors to make settlement of their accounts, and for notice to be given to creditors to attend on that day, at which time the court will proceed to settle with the executors, and the creditors will proceed to make choice of an administrator *de bonis non;* and the whole proceedings thenceforward will be governed by the act of 1843.

The law previous to 1843 made no provision for contesting claims between the creditors of an insolvent estate, and the act of 1843 says, that all objections to claims intended to be contested, shall be filed in writing in the clerk's office, within nine months from the time when the estate is declared insolvent under that act. There is evidently, then, no provision by statute regulating the time within which such objections shall be filed, where the estate is *reported insolvent* under the old law, and is to be settled through an administrator *de bonis non* under the act of 1843, as in this instance. In such case, the common law rule would be, that the written objections should be filed within a reasonable time after the appointment of an administrator *de bonis non.*

NATION *vs.* ROBERTS.

1. A security who has paid off a joint judgment, obtained by their common creditor against himself and his co-surety and their principal, is not entitled to a summary judgment on motion against his co-surety, either under the act of 1821 or that of 1839.
2. The acts of 1821 and 1839, (Clay's Digest 531, 533,) which give summary judgments in certain cases against securities, are in derogation of the common law, and must be so construed as not to embrace cases which are not within their legitimate meaning.

ERROR to the Circuit Court of Morgan.

Tried before the Hon. L. P. Walker.

This was a motion by the plaintiff to recover a judgment against the defendant for the sum of two hundred and fourteen dollars and seventy-nine cents, besides interest there-

on. The notice of the motion sets forth the grounds on which it was made, which are, that the plaintiff and defendant became joint securities for one Thomas Reed on a promissory note to the Branch Bank at Decatur, upon which suit was brought by the Bank, and a joint judgment recovered against Reed, and also against the plaintiff and defendant, for the sum of three hundred and forty dollars debt, besides the cost, which judgment the plaintiff himself paid. Reed, the principal, is insolvent, and the defendant was sought to be charged with one half of the judgment and cost, as a co-security, which the plaintiff had thus paid. The defendant demurred to the notice, and the demurrer was sustained by the court. To reverse the judgment sustaining the demurrer, the plaintiff prosecutes a writ of error to this court.

D. C. HUMPHREYS, for plaintiff in error.

The statute of 1821 (Clay's Digest 531 § 4) gives the remedy by motion against obligors, &c., for their respective shares, in favor of the security, or securities, against whom judgment has been obtained and execution awarded, when the principal is insolvent. This court has fully passed upon this statute, and sustained, by that decision, the right of the plaintiff here to proceed by the summary mode of notice and motion. Roberts v. Adams, 6 Porter 361.

The statute of 1839 (Clay's Digest 533, § 12) gives the summary remedy by motion, to a surety who has been sued against a co-surety who has not been sued; but it does not require proof of the insolvency of the principal.

Now it is true, that the letter of neither act embraces this case; but certainly the spirit of each does. The allegation of the insolvency of the principal does not take away the remedy under the act of 1839. The plaintiff had a right to proceed in a court of equity, or to sue at law, or to avail himself of the summary remedy given by statute. Couch v. Terry's Admrs., 12 Ala. 225; Sherrod v. Rhodes, 5 ib. 683; Young v. Clark, 2 ib. 264.

R. C. BRICKELL, for defendant in error.

1. The statute of 1821 (Clay's Digest 531, § 4) contemplates that the remedy provided by it shall be given, only

when judgment has been rendered and execution awarded in favor of the common creditor against *one* surety, a co-surety not having been sued by the creditor; or if one is sued, and judgment obtained against him, that on his motion, judgment should be rendered against each co-surety, for the amount for which each is liable. It does not authorize a motion to be made by one surety against another, when both are sued by the common creditor, and judgment obtained by him against both. The object of the statute was to place the sureties upon an equal footing, by giving to the surety against whom the creditor obtains judgment, a speedy remedy to compel all the sureties to contribute to the payment of a common liability. If there was already a judgment and execution in favor of the common creditor against both sureties, this remedy was unnecessary. The fact that the plaintiff in this case paid the judgment, does not affect this question. It is not the payment, but the rendition of judgment in favor of the creditor, that gives the remedy.

But suppose we adopt the construction contended for by the plaintiff in error. Immediately on the rendition of judgment in favor of the creditor, Nation was entitled to a judgment against Roberts, Roberts was equally entitled to a judgment against Nation, and this too when the creditor had a judgment against both.

2. Nor can the notice in this case be sustained under the act of 1839, (Clay's Digest 533, § 12.) That statute was passed in aid of the statute of 1821. Under the act of 1821, the surety against whom the creditor obtains judgment was not entitled to the statutory remedy, *unless the principal was insolvent.* He could not sue until after the creditor obtained judgment against him; and if there were ten sureties, and eight of them were insolvent, judgment could only be rendered for one tenth of the amount for which the surety suing was liable. To remedy these defects, the statute of 1839 was passed. To maintain the remedy given by the statute last cited, the plaintiff must allege in the notice, 1. That a suit is pending against him as surety, founded on a bill, note, bond, covenant, or other written instrument; 2. If he desires judgment for more than an aliquot portion of the debt, that the other sureties are insolvent. Broughton v. Robinson, 11 Ala. 922.

3. The cases in 2 Ala. 264, 11 ib. 922, and 12 ib. 225, construe only the statute of 1839. This notice was evidently framed in view of the remedy given by the statute of 1821. The allegation of the principal's insolvency, and of the rendition of judgment against the plaintiff, shows this conclusively.

4. The notice does not connect the defendant as surety, with the judgment, which the plaintiff alleges he paid. It is true, the plaintiff alleges that he and the defendant were sureties for Reed, on a note described as payable to the Bank. But it is not alleged, that the judgment paid by plaintiff was rendered on that note. This was a material fact, necessary to be proven, and if a judgment by default had been rendered against the defendant, a fact which the record must have shown. Brown *et al.* v. Wheeler, 3 Ala. 289.

DARGAN, C. J.—A security who has paid the debt cannot recover of his co-security by way of contribution in this summary mode. Neither of the acts upon which the plaintiff relies, goes this far. The act of 1821, (Clay's Digest, 531) allows a security who has been sued alone, and against whom execution is awarded, if the principal be insolvent, to move the court in which the judgment was rendered, for judgment against the co-securities who were not sued, for their proportionate part. The act of 1839 allows a security against whom a suit is pending, to move for judgment against a co-security who is not sued, for his proportionate share of the debt. But neither of those acts allows one security to move against the other, when the common creditor proceeds against both or all the securities, and obtains a joint judgment against them. When the creditor thus proceeds, and obtains a judgment against all the securities, until one has paid all or more than his aliquot part, he has no cause of action against his co-security; and if the judgment be satisfied by one alone after its rendition; he is then remitted to his common law remedies, and stands in the same situation as if he had paid the debt, without suit, in which case it would not be pretended that he could claim the summary remedy given by the statute. It may, however, be urged, that these statutes are remedial, and should be extended by construction so as to reach the case at bar; but the answer is, that as they are in derogation of the

common law, and give an extraordinary remedy, they must be strictly construed: I mean, they must be so construed as not to embrace cases not within the legitimate meaning of the act. See Levert v. The Planters' and Merchants' Bank, 8 Porter, 104; Murphy's Adm'r v. The Branch Bank at Mobile, 5 Ala. 421; The Adm'rs of Alexander, v. The Branch Bank at Montgomery, 5 Ala. 465.

There is no error in the judgment, and it must be affirmed.

WEATHERFORD *vs.* WEATHERFORD ET AL.

1. Filiation may be established, at common law, by a satisfactory combination of facts indicating the connection of parent and child between an individual and the family to which he claims to belong; and the principal of these facts are, that he has always bore the name of the person whom he claims as his father; that the father has treated him as his child, and in that character has provided for his education, his maintenance, and his establishment; that he has been uniformly received as such in society; and that he has been acknowledged as such by the family.
2. When filiation is once established, the law raises the presumption of legitimacy, and the burden of proof is cast upon those who assert the illegitimacy.
3. But when the evidence, by which filiation is established, also proves illegitimacy the presumption of legitimacy does not arise.
4. The presumption of an actual marriage arising from the fact of cohabitation may be rebutted, by proof of a subsequent permanent separation between the parties, without any apparent cause, and the marriage of one of them soon afterwards.

ERROR to the Chancery Court of Mobile.

Tried before the Hon. J. W. Lesesne.

This bill was filed by William Weatherford, claiming to be the only lawful son and heir of the late William Weatherford, sen'r, and as such entitled to the whole of his estate. It alleges that complainant's mother, Superlamy, was legally married to said Weatherford, sen'r, in 1812 or 1813, according to the customs of the Creek tribe of Indians, to which they belonged, and among whom they lived; that complainant had been received and treated by said Weatherford, as his lawful son; that said Weatherford afterwards lived with

one Mary Stiggins, in a state of concubinage, and had several children by her; that after said Weatherford's death, said Mary Stiggins sent for complainant, and had him carried to her house in Baldwin county, where she then resided, and that she acknowledged him to be the lawful son of said Weatherford, sen'r, and that he was always received, treated and acknowledged as such by the family, and the community in which they lived; that after the death of Mary Stiggins, one Charles Weatherford took out letters of administration on the estate of said Wm. Weatherford, sen'r. Said Charles Weatherford, and the children of said Mary Stiggins by said Weatherford, sen'r, are made defendants to the bill, and by their answers deny that said Weatherford was legally married to complainant's mother, and assert that he was legally married to said Mary Stiggins.

The chancellor dismissed the bill, holding that the proof was insufficient to establish the legitimacy of complainant.

CAMPBELL, for plaintiff in error.

1. The facts establish the filiation of the plaintiff. He bears the name of Wm. Weatherford, whose paternity he claims. He was received in the family as his son, and treated by the wife of Weatherford and his children as the child of Weatherford. He is so esteemed in the community. He was recognized by his father. Code Napoleon, Book 1, Tit. 7, Ch. 2, § 322.

2. The filiation of Wm. Weatherford being established, a presumption arises of his legitimacy. The burden of proof is shifted to the defendants to prove his illegitimacy. 1 Penn. Rep. 453; 6 Howard (S. C.) Rep. 550–587; Best on Presump. 335; 5 Coke, 89; Hubback on Suc. 250; Best on Ev. 61; 6 Eccl. Rep. 124.

3. The evidence of a marriage between the father and mother of Wm. Weatherford is sufficient. 1 Penn. Rep. 453; 4 John. Rep. 52; 18 John. 346; 2 Dana, 432; 1 Addon's Ecc. Rep. 64; Shelf. Div. 99; Hubback on Suc. 250.

4. The legal consequences of the marriage are to establish the legitimacy of the plaintiff and his title to inherit. 8 Ala. Rep. 52; Story's Conf. Laws, 100; 4 En. Eccl. Rep. 489; 3 ib. 468.

5. Complainant is not bound by the settlement in the Orphans' Court. 4 Howard S. C. Rep. 497; 1 Mylne & Keene, 200; 6 Paige, 139; 3 Russ. 136; 2 John. Ch. 614.

6. The lapse of time does not bar him from asserting his claim. 4 Dess. 330; 3 John. Ch. R. 190; Fonb. Eq. 262; 3 Howard S. C. Rep. 333; 4 M. & C. 52.

7. The bill is not multifarious; nor is the objection properly taken. 18 Ala. 439; 17 Ala. 422; 15 Ala. 485; 10 Ala. Rep. 310.

8. There is no demurrer for want of parties; nor could the court in the first instance dismiss the bill for want of parties. 1 Stew. 566; 18 Ala. Rep. 576; 12 Ala. Rep. 101–104.

9. In no case has the want of proper parties been allowed to sustain an improper decree on the merits. The absence of the parties does not go to the equity of the case.

10. The objections to the bill are hypercritical. The statute of distributions is in favor of the child. The averment that the plaintiff is the lawful child, then, shows sufficiently the character of his claim. The averment is only of matter of substance.

11. The averment of heirship is sufficient. 1 Cox Ch. Cases, 421; 1 Cox Ch. Cases, 197.

Hopkins and Percy Walker, for defendants.

The bill is multifarious. The defendant, Charles Weatherford, as administrator, had no interest in the real estate; and there is no allegation in the bill that he had any interest in his individual right. The bill is therefore bad on demurrer, and should be dismissed. It might be dismissed by the court on the hearing, without demurrer or objection from any defendant. Story's Eq. Pl. §§ 271, 284, 530, 540; 2 Howard's U. S. 642–5; 2 Anst. 469, case of Ware v. Duke of Northumberland, cited in note *n*, page 306 of Story's Eq. Pl., edition of 1844; 10 Ohio Rep. 456. The objection of multifariousness goes to the whole bill, and if sustained, it should be dismissed. 16 Ala. 87.

The bill shows that Wm. Weatherford, the deceased, died in 1823, and that the mother of complainant survived him. If she was the wife of Wm. Weatherford, deceased, and survived him, as the bill alleges, and the complainant, as he

asserts, is the only legitimate child of Wm. Weatherford, deceased, she was entitled to half the personal property of the husband. As she is dead, her personal representative only has the right to recover her share of the property. If a bill could be maintained at all against Charles Weatherford and the other defendants, the personal representative of complainant's mother would be an indispensable party. Story's Eq. Pl. §§ 72, 73, 77, 170, 219; 1 Stew. 542; 3 Pr. Williams Rep. 349; 1 Williams' Ex. 396–411; 17 Ala. 816; ib. 40. The objection for want of proper parties may be taken on demurrer, or at the hearing, by any defendant, or may be taken by the court. Story's Eq. Pl. § 75; 18 Ala. 575; 16 Ala. 625.

The bill does not indicate whether the complainant claims the whole of the property, or one-third, or one-fourth. It is therefore uncertain, and demurrable for that reason. Story's Eq. Pl. §§ 241, 245, 254, 257; 4 Con. Eng. Ch. Rep. 158; Wigram on Discovery, 13 Law Lib. 35. The defendants do not know from the bill what case they must prepare to meet. 13 Ala. 694–696: 3 Mer. 667, case of Carlton v. Leighton.

There is no allegation in the bill that the alleged marriage of the complainant's mother took place in the country, which it is stated, was governed by the Indian laws relating to marriage. The complainant therefore shows no title to what he claims, because he does not show that the marriage was valid according to the laws of the place where it is alleged to have been entered into. 10 Watts, 158; 7 Watts, 353. There is no fixed, universal law as to marriage. The law of one country requires to make a marriage valid what would not constitute it in another. Hence the necessity for such allegations in the bill as are relied on to show a marriage. Story's Conflict of Laws, §§ 113, 121, 122–3; Poynter on Marriage and Div. 13 Law Lib. 96 et seq.; Shelford on Marriage and Div. 33 Law Lib. 116 et seq.

The bill is bad, because it shows no title. Story's Eq. Pl. §§ 503–508. There is no allegation in the bill of what the Indian laws required to constitute a marriage. It is therefore fatally defective. Story's Eq. Pl. § 241; 6 Howard (U. S.) 589; Wigram on Discovery, 13 Law Lib. 35–6.

The evidence greatly preponderates against the allegation

in the bill, that the mother of complainant was the wife of Wm. Weatherford.

It is not denied that cohabitation and reputation, &c., may in certain cases be *prima facie* evidence of marriage, but an examination of the cases, in which it has been so ruled, will show, that the testimony was infinitely stronger and more satisfactory than that adduced by the plaintiff in error. See 8 B. Monroe, 113; 12 S. & M. 9–56; 1 H. & McH. 152; 8 Gill & J. 50; 4 Johnson, 52; 2 Haywood, 102; Taylor's Conf. Law and Eq. Rep. by Battle, 72. These cases show that there must be proof, not only of cohabitation and reputation, but of acknowledgment. More is required to authorize presumption of marriage than mere proof that a man and woman lived together. 8 Paige, 574–582; 4 B. Monroe, 575.

Cohabitation will authorize no presumption of marriage, unless that cohabitation is shown to have been of a permanent nature. A mere temporary commerce will not answer. See 11 Ala. 838–9, and Shelford on Marriage and Div. in 33 Law Lib. pp. 26–30.

The presumption arising from cohabitation, &c., will be rebutted by proof of long separation, &c. 18 Johnson, 346.

Again: It is not shown that proof of living together as man and wife, constituted a valid marriage, by the Indian laws.

The complainant has made no proof that the requisite ceremonies attended the union between his mother and Wm. Weatherford, deceased, nor has he alleged in his bill that they did. 6 Howard U. S. 587; 10 Watts, 168; 7 Watts, 353; 1 Texas Rep. 624–5–6.

The evidence shows that there was a separation between them; and the testimony of Moniac and others proves that under the operation of the Indian laws and customs, this was a divorce. The effect is the same as if there had been a lawful decree. 8 Ala. 48.

The extension of our laws over the Indian territory will not take from an Indian marriage its dissoluble quality. 11 Ala. 826; 5 Humph. 13.

Complainant was born after the separation between his mother and Weatherford, and this rendered him illegitimate under the Indian laws.

He cannot claim any part of his father's estate. 8 Ala. 48. The testimony shows that according to the Indian laws the child inherited from the mother, and not from the father. As to effect of this, see 8 Ala. 48.

The evidence proves that, under the Indian laws, the husband could divorce himself at any time. See 13 Ala. 793.

The proof is conclusive as to the marriage of Wm. Weatherford, sen'r, with the mother of the defendants.

When the proof of a second marriage is clear, a prior marriage will not be presumed from the facts of cohabitation and reputation, for the purpose of invalidating the subsequent marriage, and rendering the issue illegitimate. 1 Penn. Rep. 452; 1 J. J. Marshall, 105.

The burden of proof in this case is upon the plaintiff in error, who insists on the invalidity of the second marriage. 6 Howard U. S. 597.

The remedy of the complainant, if he ever had any, to the personal property of Wm. Weatherford, deceased, is barred by the lapse of six years after he had his full age, and before he filed his bill. 7 Johnson Ch. Rep. 113, 114, 126; Story's Eq. Pl. § 751; Story's Eq. Jurisprudence, 2 vol. pp. 981–2–3; 2 Ala. 555.

As to the half of the personal estate to which the mother of complainant would be entitled, if the bill were true, the claim of her representative is barred by the lapse of twenty years.

Adverse possession of the whole estate was taken by the mother of Alexander and Mrs. Howell, immediately upon the death of Wm. Weatherford in 1823 or 1824.

The statute of limitation began to run against complainant's mother upon the happening of that event. The bar is therefore complete against her and her legal representative.

As the bar of the statute appears on the face of the bill, the defendants can avail themselves of it upon demurrer, without plea. 15 Peters, 272; 22 Law Lib. 313; Story's Eq. Pl. § 503. But here the statute is pleaded, and the evidence proves the bar.

The bar of the statute applies to courts of equity, as to courts of law. 5 Ala. 90; 15 Peters, 272; Story's Eq. Ju-

risprudence, 2 vol. pp. 981–2–3 § 1520, and note thereto at p. 984 of edition of 1846.

Even in cases where the law makes no application of the statute, courts of equity will apply it where there has been *laches*, as in this case. Story's Eq. Jurisprudence, cited above; 7 Howard, 258; 2 Jacob & Walker, 191.

CHILTON, J.—Many interesting, and some novel points have been elaborately and ably discussed by the counsel, in the argument of this case; but the view which we feel constrained to take of it from the proof in the record, renders it unnecessary to go into their examination.

The complainant claims to be the legitimate son and sole heir of William Weatherford, deceased, and as such, entitled to his whole estate. Upon this allegation, that is, upon his legitimacy, his title depends.

The answers, which are responsive to the bill, explicitly deny that the said William Weatherford was ever married to the complainant's mother, and they further deny the existence of the main facts charged in the bill, tending to establish the filiation of the complainant.

The burden of substantiating his averments by such proof as, under the rules of chancery practice, will authorize the court in pronouncing for the complainant, is thus cast upon him.

The evidence relied upon to establish the complainant's legitimacy, may be considered under the following heads:

1. Facts tending to establish filiation.

2. Reputation and cohabitation of his father and mother, as man and wife.

3. Proof tending directly to establish a marriage between his parents, according to the custom of the Creek Indian tribe, to which they belonged.

We agree with the learned counsel of the complainant, that the doctrine as laid down in the Code Napoleon, Tit. VII, § 32, respecting the evidence of filiation, is equally the doctrine of the common law: that "the enjoyment of this condition is established by a satisfactory combination of facts, indicating the connection of parent and child between an individual and the family to which he claims to belong." The

principal of these facts are said to be, that the individual has always borne the name of his father to whom he claims to belong; that the father has treated him as his child, and in that character has provided for his education, his maintenance, and his establishment; that he has been uniformly received as such in society, and that he has been acknowledged as such by the family.

We may further concede the proposition insisted on for the complainant, that if there be sufficient proof to establish filiation, the law raises the presumption of his legitimacy, thus shifting the burden of proof on those asserting his illegitimacy.

Upon narrowly scanning the proof, however, we are unable to discover any evidence of filiation sufficient to countervail the force of the positive denials of the answers, especially when we consider it in connection with the opposing testimony.

It may be proper to observe, that in considering the evidence, we should not entirely exclude from our view the fact, that William Weatherford was a person of much notoriety as a military chieftain and leader of his tribe, and that serving in that capacity during the most of the time when it is alleged he cohabited with Superlamy, the mother of the complainant, it is fair to presume, that the impression as to whether his connection with her was lawful or illicit would have been very general, and that the proof of the connection being licit would be more readily obtained than if such connection had existed between less notorious persons.

It is not shown that William Weatherford, the elder, ever saw the complainant. On the contrary, it is proved that Superlamy left his residence in Baldwin county while she was pregnant with the complainant, and never returned; and that the complainant was brought by a relative to the residence of Mary Weatherford, formerly Mary Stiggins, after the death of his mother, and subsequent to the death of said Weatherford; so that the record totally fails to furnish any evidence of filiation, arising from the treatment or recognition of the complainant by William Weatherford, senior.

The proof also sufficiently establishes that Mary Stiggins, *alias* Weatherford, raised complainant and sent him to school,

and said to several witnesses that he was the son of William Weatherford; also, that her children by Weatherford called him "brother," and treated him as a half-brother. But the proof, coupled with the answers, clearly preponderates to establish the position, that neither she nor her children ever recognized him as the *legitimate* offspring of said deceased. Lucretia Sizemore says, Mary Weatherford did not recognize him as a legitimate son of William Weatherford.

Susan Sizemore says, he was not regarded as an heir.

William Sizemore says, Mrs Mary Weatherford did not own him as a lawful son, and that while her children recognized him as a brother, they did not regard him as one of the heirs.

These witnesses were examined by the complainant, and the only proof to show that he was regarded otherwise than as illegitimate by the family, is made by Samuel and Lucretia Edmunds, and they only prove that he was regarded in the family as William Weatherford's son, without stating whether as his legitimate or illegitimate son.

We come therefore to the conclusion, that the proof of filiation is not sufficient, or rather is of that character which, while it proves filiation, disproves legitimacy, and is not sufficient to shift the onus of proof by raising a presumption of legitimacy.

The fact that the complainant was residing in the family of the late William Weatherford, up to and at the time of the division of the property, as proved by W. C. White, that he was then of lawful age, and interposed no objection to the division which was made by order of court, and which proceeded upon the ground of his illegitimacy, and consequent inability to take as heir or distributee, is another circumstance going to corroborate the conclusion, that while his paternity was acknowledged, he was not regarded as the issue of lawful wedlock.

When we come to the proof of reputation and the cohabitation of the complainant's mother and father, we think the decided weight of evidence is against the complainant.

It would unnecessarily swell this opinion, to copy the evidence afforded by the depositions of the several witnesses upon this head. Samuel and Lucretia Edmonds, and Susan

Sizemore state, that they (Weatherford and Superlamy) were reputed to be man and wife in the neighborhood in which they lived; whereas, on the other hand, William Sizemore, Lucretia Sizemore, Gilbert C. Russell and William Hollinger prove that the connection was reputed to be illicit. Elizabeth Moniac proves that Weatherford "took up" with this woman at the "Holy Ground," where the Indians were generally assembled after the massacre at Fort Mims, during the war, and that complainant was always reputed to be a bastard. This proof fails to show that complainant's claim to legitimacy, as deducible from reputation, can be sustained.

There is no proof of actual marriage according to the Indian customs; and the presumption of an actual marriage from the fact of cohabitation is rebu'ted by the fact of a subsequent permanent separation, without any apparent cause, and the marriage in solemn form of Weatherford to Mary Stiggins, which took place shortly after the separation. See Senser et al. v. Andrew Bower and Wife, 1 Penn. Rep. 452; Jackson v. Claw, 18 John. Rep. 346.

Without, however, commenting more at large upon the testimony, we are fully satisfied that the whole proof entirely fails to establish the relation of man and wife between Weatherford and Superlamy, and consequently fails to sustain the claim of the complainant, which is dependent upon proof of that relation.

This view accords with the conclusion attained by the Chancellor, and his decree must be consequently affirmed.

DARGAN, C. J., not sitting.

WEAVER'S EXECUTORS *vs.* WEAVER'S CREDITORS.

1. An estate having been reported insolvent, and notice given to creditors to file their claims against it, under the law existing previous to the act of 1843, and no other proceedings being had until after the passage of that act, it is error for the court to proceed at once to a settlement with the executors, against their objection.

2. The next step in the proceedings should be, the appointment of a day for the executors to settle, and notifying the creditors to attend; on that day the court should proceed to settle with the executors, and the creditors to choose an administrator *de bonis non*, and thenceforward all the proceedings should conform to the act of 1843.

ERROR to the Court of Probate of Madison.

The facts shown by the record in this case are identical with the facts in the case of Steele v. Weaver's Executors, (see page 540) and it is therefore unnecessary to repeat them here. The record here also shows, that the executors moved the court to take up the several claims which had been filed against the estate, and especially those to which objections had been filed, and to pass upon such objections, and the validity of said claims, and to allow or disallow them, before requiring the executors to settle their accounts with the estate. The creditors resisted this motion, and insisted that the estate had not been properly reported or declared insolvent, and that the court could not settle the contests between the creditors until the executors should settle their accounts, "they having been cited to do so." The court decided that it would then settle the executors' accounts, before taking up the contested claims. The executors appealed from this decision, and now assign it for error.

The proceedings are entitled "In the matter of the final settlement of Fleming Jordan, executor, Matthew H. Bone, in right of his wife executor, and Martha H. Bone, executrix, of Geo. I. Weaver, deceased;" but the record does not anywhere show that the executors had been cited to make settlement of their accounts, except by the recital in the bill of exceptions, "they having been cited to do so."

JAMES ROBINSON and R. C. BRICKELL, for plaintiffs in error:

The estate having been reported insolvent prior to the act of 1843, all the proceedings had before the passage of that act must be governed by the law then in force. Martin v. Baldwin, 7 Ala. 923. The court, finding the estate so reported insolvent, took it up at that point, and had no power to do anything further, than to give notice to creditors, and compel a settlement. In doing this, it had to be governed by the

law of 1843, so far as it was applicable. Under that law, the court could not compel the executors to make a final settlement, until the claims of creditors had been passed upon and allowed. Clay's Digest 194, §§ 11, 12.

In this case, the court had no power to order a settlement under the fifth section of the act of 1843; because it was already reported insolvent when that law was passed, it had been properly reported insolvent under the old law. Lambeth and wife v. Garber, 6 Ala. 671; Clarke v. West, 5 ib. 117.

WM. COOPER and D. C. HUMPHREYS, *contra:*

1. To show that, under the state of facts disclosed by the record, the act of 1843 forms the rule of action for the Court of Probate, see 12 Ala. 494; 7 ib. 923; 10 ib. 915.

2. It was the duty of the court, as there were some contested claims, and others which were not denied, to go into an accounting with the executors; and on such statement of the accounts, to distribute to those creditors whose claims were not denied, their respective *pro rata* shares, retaining in the hands of the administrators sufficient to satisfy the contested claims, in the event they should be allowed. There was no reason, and no law, for withholding their *pro rata* share of the assets, from those creditors whose claims were not contested, until the contested claims were settled. The event of those contests could not affect them, except on the future orders of distribution. If all the claims were allowed, there would be nothing further to distribute to them; if all were disallowed, the residuum would have been distributed by further order. 8 Ala. 457.

Again: it never was imperative on the court to decree distribution on the final settlement; and an administrator could always be constrained to make final settlement, or annual settlements, and on failure might be removed. An administrator might be removed, and made to settle up before the expiration of eighteen months, the time when the right of distribution would accrue; whatever would be good cause of removal from office, would be good reason to compel a settlement. The amount in the administrator's hands may be ascertained at one term, and distribution made at another term. 4 Porter 124; 9 Ala. 497.

Before the act of 1843, it was discretionary with the court to cause the administrator to settle before distribution; after the passage of that act, we do not think it was in the discretion of the court, to permit the administrator to retain all the funds in his hands until the contested claims were settled, but the court was in duty bound to decree at least a partial distribution of the assets among the creditors whose claims were not contested.

PHELAN, J.—In this case, which was submitted at the same time with the case of Steele v. Weaver's Executors, the question of law arises upon the same state of facts. Here the question was, whether, after the notice had been given for creditors to file their claims, the court should first proceed to settle the accounts of the executors, or to hear and determine objections which had been made to the allowance of certain claims which had been filed. The court decided that it would then proceed with the settlement with the executors, against their objection. This was an error, agreeably to the views taken in the case of Steele v. Weaver's Executors, for which the decision of the court below must be reversed in this case also, and the cause remanded. It was not proper to do either just then. All the proceedings, after notice had been given for creditors to file their claims, must conform to the act of 1843; and, as we decided in the former case, the first thing next to be done was, for the court to appoint a day for the executors to settle, and to give notice for creditors to attend. Then, on that day, the court should proceed to settle with the executors, and the creditors to choose an administrator *de bonis non;* and thenceforward all the proceedings should conform to the law of 1843.

DAVIS *vs.* LASSITER.

1. A mortgagee who is in possession of the mortgaged property before the law day under the mortgage, is bound to account to the mortgagor for the rents and profits, unless there is a stipulation to the contrary in the mortgage.
2. And parol evidence cannot be received, to show that by the terms of the contract he was to have the possession of the property without accounting for the rents and profits.

ERROR to the Circuit Court of Barbour.
Tried before the Hon. John D. Phelan.

This was an action of assumpsit, brought to recover for work and labor done by the plaintiff's slave. It appeared upon the trial, that the plaintiff had purchased the slave, and to secure the purchase money the defendant had become her security, and to indemnify him, the plaintiff executed a mortgage conveying the slave to the defendant, in which it was stipulated that the defendant should have the possession of the slave until the plaintiff paid the purchase money; and should the plaintiff fail to pay it at maturity, the defendant was thereby empowered to sell the slave, and from the proceeds of his sale to pay the debt. The defendant then offered to prove by a witness, that he was to have the services of the slave free of hire. To this parol evidence the plaintiff objected, as the mortgage was silent on this subject; but the objection was overruled, and the plaintiff excepted. The admission of this parol evidence is the only error assigned in this court.

BUFORD, for plaintiff in error.
COCHRAN, *contra.*

DARGAN, C. J.—Although the general rule of law is, that the mortgagee in possession must account to the mortgagor for the rents or profits of the mortgaged property, yet we apprehend that there may be cases where the parties, by contract, may vary or change this rule, and thus relieve the mortgagee from accounting for the profits which he has, or might have received. This, I think, would have been the rule in the present case, if the contract of mortgage had shown

that the mortgagee was to receive the profits of the slave to his own use, in consideration of his becoming liable, as security for the plaintiff, to pay the purchase money agreed to be given for the slave. But the question before us is this, can parol proof be received to show that such were the terms of the contract? When parties have reduced their contract to writing, in terms clear and unambiguous, oral testimony cannot be received to contradict or vary the legal import of the contract. By reducing the contract to writing, the written instrument becomes the only evidence of the intention of the parties, and no other words or terms can be added to it by parol proof. This principle of law, time after time, has been announced by this court. Indeed, it is admitted by all; but the difficulty is, in making the application of the rule to every particular case; still, however, we must test each case by it, and if the parol proof is rejected by this rule, it cannot be admitted.

Now, the mortgage is silent as to that part of the contract, to establish which the defendant introduced parol evidence. It provides that the defendant shall have the possession of the slave until the debt was paid, and also authorizes him to sell the slave and pay the debt, if the plaintiff failed to pay; but it says nothing about the defendant's right to appropriate to himself the services of the slave until the debt was paid, in consideration of his becoming liable as security for the payment of the purchase money. As the instrument is silent on this subject, the legal construction of it is, that the defendant being a mortgagee only, he must account to the mortgagor for the hire of the slave; and to permit this legal construction to be altered, by proving another fact not written in the mortgage, would be to add to the written instrument by oral testimony, and thus to change its legal effect.

The decisions of this court clearly show that this cannot be done. Duff v. Ivey, 3 Stew. 140; Barrenger & Rhodes v. Sneed, ib. 201; Mead v. Steger, 5 Por. 498; Hall v. Moore, 5 Ala. 521; Long v. Davis, 18 Ala. 801.

The court erred in admitting the parol proof, and the judgment is reversed and the cause remanded.

POOL ET AL. *vs.* CUMMINGS & CO. ET AL.

1. A Court of Chancery looks only to the equities of parties, and regards the holder of the mere legal title as a trustee for the benefit of all parties equitably interested.
2. As a general rule, recitals in a deed are not evidence of consideration, in a controversy between those claiming under it and a pre-existing creditor of the grantor, in which it is impeached for fraud or want of consideration.
3. A written agreement was entered into between complainants and one P., for the entry and purchase in partnership of lands to be used for mining purposes. Complainants agreed to advance the purchase money, and P. was to enter the lands which he deemed most suitable for mining, and to superintend the working of the mines. The money advanced by complainants was "to be refunded, with interest, out of the first funds realized by the company." P. entered several tracts of land in his own name, with money advanced by complainants, and afterwards transferred them to complainants, to whom patents were subsequently issued by the Government. Some of the lands were sold under execution against P., after the entry in his name but before the issue of complainants' patent, and were purchased at the sale by the judgment creditor, against whom complainants afterwards filed their bill, praying that the lands might be sold, that the purchase money advanced by them, and expenses incurred in payment of taxes, &c., might be refunded to them, and that the residue of the proceeds might be divided according to the terms of the agreement. *It was held,*
   1. That even if the legal title to the lands vested in the purchaser by the sale under execution, still this would not avail him in a court of equity, if complainants had the superior equitable title.
   2. That the registration of his deed by the purchaser, coupled with the complainants' failure to have the written evidence of their claim spread upon the records of the county, did not add any potency to the purchaser's title which it would not otherwise have possessed.
   3. That if complainants advanced the purchase money, and P. acted in the purchase, not for himself individually, but as the partner or agent of the complainants, the complainants were entitled to equitable relief against P., or a purchaser claiming under him, who could only succeed to his rights.
   4. That the written agreement of the parties, and the receipts subsequently executed by P. to the complainants, for the moneys advanced by them, were admissible evidence for the complainants.

ERROR to the Chancery Court of Tuskaloosa.

Tried before the Hon. W. W. Mason.

MOODY, *pro se.*

On the part of the plaintiff in error, Moody, it is insisted that he has a good and perfect title to the lands described in his answer, which ought to have been recognized by the court below.

His note is dated 2d January, 1837; his judgment, 5th February, 1839; his deed, 5th August, 1839. The alleged agreement is dated 12th January, 1837; the patents are dated 20th September, 1839.

Moody's answer, responding to the bill, denies the allegation that the lands he claims were entered in copartnership; but, on the contrary, states that they were entered by Pool, in his own individual name—a portion before, and a portion after the date of the alleged agreement; and that certificates were issued to Pool, in his own individual name; and that all this is shown by the books of the land office. The evidence introduced by complainants, fully sustained these portions of his answer. The patents, (which were all issued, not only after the date of the judgment, but after the date of the sheriff's deed,) show that the patentees are the "assignees of Kinney Pool."

According to the settled law of this court, Pool had a title subject to sale under the judgment at law. Falconer v. Jones & Leath, 15 Ala. Rep. 12; same parties, 12 Ala. Rep. 165.

2. Is there such evidence of a transfer by Pool to his copatentees, prior to the lien of the judgment, as will defeat the title acquired by the sheriff's sale? The several papers introduced by complainants, the signatures to which were admitted to be in the handwriting of Pool, cannot have that effect. Being admissions of Pool, they were good as against him; but being mere admissions or declarations of Pool, they cannot affect the rights of Moody, who was a pre-existing creditor, whose note, which is the foundation of his judgment, bears date prior to the alleged agreement. There was no extrinsic proof whatever, either that those papers contained the truth, or that they bore their true dates, or that there was any valuable consideration. They were the mere declarations or admissions of Pool—not even under oath. These remarks apply as well to the alleged agreement, as to the receipts and bond. In the language of this court, "In a contest between a creditor and one claiming through the debtor, it is necessary for the latter to prove that the conveyance was not voluntary, by showing that a valuable consideration was given for the property. This is not shown by the recital of that fact

in the conveyance, as that is the mere declaration or admission of the grantor; but must be proved by extrinsic evidence." Branch Bank at Decatur v. Kinsey, 5 Ala. Rep. 12; Falconer v. Jones & Leath, 15 Ala. Rep. 12–13.

If the law were otherwise, it would be easy to simulate a transaction, to manufacture ostensible proof, as occasion might require, and thus, by management and fraud, place at defiance the creditor of a debtor, who, as in this case, was angry with him, and not at all disposed to pay his debts.

3. The only remaining testimony is the certificate of the commissioner of the general land office, of an "abstract of certain sales of lands made to Kinney Pool, at the land office at Tuskaloosa, in the year 1837." The court will give no more effect to this certificate than it is properly entitled to. It will not be extended beyond its own language, "an abstract of certain sales of lands made to Kinney Pool." It does not extend to "transfers" from Pool to others; the transfers are not certified to be a true copy; what is said of transfers is certainly not a "copy."

If his certificate extended to the transfers, so much of it would clearly be inadmissible. The commissioner cannot be permitted to substitute his judgment for that of the court, and detemine what is a transfer and what is not. He must give the instrument itself, or at least a copy of it, that the court may determine its legal effect. This is the more important, as "the practice of the land office, from a very early date, has been to recognize assignments, even less technical than this court has held to be valid, and patents daily issue to assignees of the certificate, under the hand of the original purchaser." Falconer v. Jones & Leath, 12 Ala. Rep. 171, and authorities there cited.

To defeat M's. title, the complainants should have shown the transfers themselves, or at least a copy of them, and that they were made *bona fide*, and at the time of their dates, and that they were "under seal;" they should also have shown that they were given for a "valuable consideration." None of this was done. It was the more important to prove these things in this case, as Vincent (it is matter of public history) was the Register of the land office at Tuskaloosa at the time of these transactions, whereby it was the more easy to fix up

things and ante-date instruments. And there is reason to believe (apart from the record) that these transfers were all made after the judgment. 6 Porter's Rep. 383, Ansley v. Nolan; 12 Ala. Rep. 171, Falconer v. Jones & Leath; 15 Ala. Rep. 12–13, same parties; 5 Ala. Rep. 12, Branch Bank at Decatur v. Kinsey.

4. Moody, in his answer, avers that for many years after he had purchased the lands he claims, at the sheriff's sale, he had never known or heard that there was any such agreement as that set forth by complainants; or that said complainants, or either of them, had any claim or pretence of claim to said lands. He avers that the agreement, or any other writing in regard to said lands, between the complainants and Pitcher and Pool, never was recorded in the proper office. There being no replication or proof to the contrary, this is to be taken as true. 12 Ala. Rep. 171–2, Falconer v. Jones & Leath; Clay's Digest.

5. If Moody's title to the lands he claims is good, it was error to decree the sale of them at the instance of complainants, and without his consent.

6. And more erroneous to allow him only one third of the proceeds of the sale.

7. And yet more erroneous to deduct first the expenses allowed and the costs of suit. If complainants had any demand against Moody for taxes or other expenses, they had their remedy at law. There was no necessity or propriety in dragging him into expensive litigation in chancery.

8. There was error in ordering the notes for the purchase money to be paid to the complainants. If they should collect the money, it might be wholly lost to Moody.

P. & J. L. Martin, for defendants:

The claim of defendant, Moody, rests upon his purchase of Pool's interest in a part of said lands at sheriff's sale, under a judgment rendered in his favor against Pool, in Tuskaloosa County Court, 5th February, 1839, more than two years after the entry and transfer of the lands by Pool to the company. No fraud is pretended in these transactions, by proof or otherwise.

We contend, that the Chancellor erred in decreeing one

third of the proceeds of the lands to Moody; because, we say, that the lands in the hands of the firm were first bound for their original cost, with interest, to the members of the firm who paid for the same; that Moody could acquire no better interest in the lands than defendant Pool had; and that hence the decree should have directed the purchase money first to be paid, and then the one third of proceeds to be paid to Moody.

The formation of the copartnership having been made long anterior to the accrual of any lien or interest on the part of Moody, it was not necessary for complainants to show any thing further as to the receipt of money by Pool, or any other part he took in the premises, than is evidenced by his own acknowledgments. Moody's claim is entirely derived through Pool. The assignment of the certificates by Pool, whether bought with his own money or that of the firm, divested himself of two thirds of his original interest, and cannot be complained of by Moody, who at the time had no interest, and acquired no lien until two years thereafter; and the pretext set up, that the note of 2d January, 1837, was the foundation of his judgment, has nothing to do with the question in the absence of an issue of fraud, which is not and cannot be pretended in the proceedings before the court. Such an issue could only be presented by a cross bill impeaching the transaction for fraud, of which there is not a ground shown; and if it could be set up, there is not one word of proof to support such supposition.

The same may be said in regard to the proof of the advance of money by complainants to make the purchase; the acknowledgment of Pool of its receipt, cotemporaneously with the partnership, is all that can be required of the complainants.

The further demand of defendant Moody of the entire lands claimed by him, is equally unreasonable and unjust, in every aspect of the case presented. The transfer of the land after entry, if fraudulent on the part of Pool, would not be sufficient, unless the complainants were participators therein, which cannot be pretended here.

CHILTON, J.—This was a bill in chancery, filed by John O. Cummings & Co. and Vincent & Pitcher against Pool and

others, alleging, that on the 12th day of January, 1837, said complainants entered into an agreement with said Pool for the entry and purchase in copartnership of certain coal lands in Tuskaloosa County, Alabama. An agreement, signed by them respectively, is appended to the bill, by which it appears, that on the date above, the parties agreed to form a company for the purpose of entering or purchasing coal lands, and for the purpose of mining coal, should they thereafter determine to mine; the interest or proportion of the parties in the enterprise to be, one third to Pool, Vincent & Pitcher one third, and the remaining one third to John O. Cummings & Co. The two firms last named, who are the complainants, it is recited, "have paid the said Pool the sum of five hundred dollars, in consideration of which he is to use his best exertions to ascertain where the most desirable entries of land for coal may be made, and with the consent of the company enter, or have the same entered, for account of said company, and is also to superintend the working of said mines, in case the company should determine upon working them." The complainants agreed to advance the money required to make such entries as should be deemed advisable, in equal proportion; that is, Cummings & Co. were to furnish one half, and Vincent & Pitcher the other half, "all such advances to be refunded them, with interest, out of the first funds realized by the company;" but advances made for purposes other than the entry of lands, &c., should be borne by the parties respectively, in proportion to their interest. Pool agreed to transfer to the company the entry last made by him next before the date of the agreement. There are other provisions in the agreement, but it is unnecessary to set them out, as they are not involved in the questions before us.

The complainants further allege, that in pursuance of such agreement they advanced the money, and the said Pool entered divers tracts of lands at $1 $\frac{25}{100}$ per acre, amounting in the aggregate to 809 $\frac{73}{100}$ acres; that they have incurred expenses in payment of taxes and surveying the lands, none of which has been returned to them; that since the lands were purchased nothing has been done with them; that Pool became insolvent and removed to Iowa; that Pitcher was discharged under the bankrupt act, having previously sold his

interest to the defendant Aiken; and that Moody and Douthit claim an interest in some of said lands, which they, as defendants, can discover.

The prayer is for a sale of said lands, and after a return of the purchase money and expenses incurred, with the interest, the division of the remainder according to the agreement.

Moody answers the bill, and substantially denies the interest of the complainants, and requires proof of the allegations of their bill. He insists that he was the creditor of Pool by note bearing date 2d January, 1837, ten days before the date of Pool's agreement with the complainants; that he obtained judgment on this note against Pool 5th February, 1839; and that 480 acres of the land, which the bill alleges was purchased by Pool with complainants' money, were sold under execution and purchased by him, as appears by the sheriff's deed to him, dated 5th August, 1839; that he bought in ignorance of the complainants' claim; has caused his deed to be regularly recorded, and claims the benefit of a *bona fide* purchase for a valuable consideration; and also insists that his title, which has been duly recorded, should not be postponed to the unrecorded title of the complainants.

It appears, by the certificate from the Commissioner of the General Land Office, that Pool, on the 6th Jan., 1837, had entered in his own name one 80 acre tract; that he entered three other 80 acre tracts on the 12th, two more on the 16th, and two on the 19th of the same month, all which, being entered in his own name, he transferred in the Land Office, on the day last named, to Kinney Pool, John O. Cummings, Chas. G. Pitcher, Wm. L. Powers and John H. Vincent. These, with two other tracts, each embracing eighty acres, bought on the 23d January, 1837, and transferred on the same day in like manner, constitute the entire lands which the complainants allege were purchased under the agreement. Upon these transfers patents were issued to the several persons above named, as assignees of Pool, dated the 20th September, 1839. The complainants also introduced the original copartnership agreement, and two receipts of said Pool, executed on the 12th January, 1837, acknowledging the reception by him, to be expended in the entry and purchase of land, of $600; also the bond of Pool, dated 23d January, 1837, by which he

acknowledged to be due the complainants $337 $\frac{39}{100}$, being for Pool's one third of the cost of certain lands entered to date in company with them, and binding himself to pay to the complainants said sum, with interest from date, out of his proportion of the first funds realized by the company, through sale of the lands or otherwise, or whenever he should make sale of his interest. The signatures to these several instruments were admitted to be genuine.

Moody introduced the record of the recovery of his judgment, and the sheriff's deed, as before stated, and this constitutes the case made by the record before us.

The Chancellor decreed a sale of the lands, but held that the lands bought by Moody should not be charged with the payment of the demand sought to be enforced as a lien for the purchase money, but that all the lands should be liable for the taxes, and the expense of surveying made by the company, and that Moody should have one third the nett proceeds of those he had purchased. Both parties are dissatisfied with the decree: Moody, that the court should at all interfere with his title; the complainants, that Moody's third should not also be charged with the indebtedness of Pool to them, for his share of the purchase money.

1. Conceding that Pool had such interest as could be sold under execution at law, and that the *legal title* to the lands bought by Moody, vested in him by virtue of the sheriff's deed, this cannot aid him in the Court of Chancery, which looks to the equities between the parties, and regards the holder of the mere legal title as a trustee for the benefit of all parties equitably interested.

2. Neither does the fact that Moody had his deed recorded, and that the complainants had no evidence of their claim spread upon the records of the county, add any potency to Moody's title, which it would not have possessed aside from such registration. The land, so far as the record discloses, was not in the actual occupation of any one, and the complainants do not claim an interest in them by any deed of conveyance to them which the law required to be registered in the county. The record evidence of their claim is to be found in the office of the Register and Receiver of the District Land Office, and the General Land Office of the United

States. Moody has not claimed the land a sufficient length of time to raise any question upon the statute of limitations, so that the parties are remitted to their equities growing out of the transaction.

It is very clear, that if the lands in controversy were purchased under the copartnership agreement, and are to be regarded as assets of the concern which was created for mining purposes, then each of the partners has a lien on them, not only for the amount of his share, but for moneys advanced by him beyond that amount, for the use of the partnership, Story on Par. 137; Coll. on Par. 65; 1 Ves. 142; 1 Sum. Rep. 173. On the other hand, if they are not to be regarded as strictly partnership assets, yet if the complainants furnished all the money which was expended in their purchase, under an agreement that this money should be returned to them, with interest, out of the first proceeds, here would be a lien created by the agreement of the parties, and any person who should purchase the interest of either, would take such interest charged with this lien. Further, if the complainants advanced all the purchase money, and Pool, in disregard of the agreement to buy the lands for the company, had bought them in his own name, a trust would result in favor of complainants; and as Pool would not be allowed to take advantage of his violation of the trust reposed in him to defeat their rights, so neither can a purchaser, who succeeds only to the rights which he possessed, and nothing more. So that, in any view of this case, if the proof is sufficient to establish what the bill asserts, namely, that the complainants advanced the money to pay for these lands, and that Pool, who paid it, was acting, not for himself individually, but as the partner or the agent of the complainants, a clear case is made out for equitable relief.

But it is strenuously urged by Mr. Moody, that the agreement and recitals therein contained, as well as the receipts given by Pool to the complainants, showing the money advanced to him by them under the agreement, as also the bond which he gave them after the date of the last entry made by him, showing the share of the purchase money they had advanced for him, and evidencing his agreement to refund the same to them, are all of them to be regarded as the mere ad-

missions of Pool, and should not be received against him, (Moody) to defeat his claim as a purchaser under a judgment rendered on a note of older date than the agreements.

As a general rule, it is true that the recitals in a deed are not evidence of a consideration, in a controversy between those claiming under it and a pre-existing creditor, when it is impeached for fraud, or want of consideration, by such creditor. The case of Jones & Leath v. Falconer, 15 Ala. Rep. 12, and the cases cited in the opinion in that case, show the extent to which this doctrine has been carried by this court. We are not in the least disposed to trench upon the law as it has previously been settled, and, without questioning the correctness of these cases, we are of opinion they do not affect the case before us.

In McCaskle v. Amarine, 12 Ala. Rep. 17, the reason for the rule which excludes such instruments or recitals, is correctly stated to be, the danger which exists of parties simulating debts, and manufacturing in this way the ostensible proof of them, as occasion might require, and thus being enabled to place their creditors at defiance.

In the case before us, there was no objection to the receipt of these instruments in evidence; the signatures to them were admitted to be genuine, and the only question was, as to their legal sufficiency to establish the fact of the advance of the money as alleged. Taken in connection with the other evidence, which, as it is made by the Commissioner of the General Land Office, there can be no reason to suppose could be made with a view of sustaining the written instruments between these parties, any further than such instruments truly represented the facts, we arrive at the conclusion, that it is sufficiently shown that the complainants advanced the money for these lands, and that Pool actually owed them, for his share of the purchase money, the amount stipulated in his bond.

The amount expended in the lands entered, substantially corresponds with the amount of money furnished Pool by complainants. The dates of the entries and transfers show that these agreements were not ante-dated; these, added to the fact that the admissions which Pool made were against his own interest, and no direct attempt is made to impeach the transfers as fraudulent, sufficiently satisfy us that the sev-

eral instruments were not simulated, or manufactured to suit the occasion, but are the genuine evidence of a real transaction, which they correctly set forth.

We are unable to see in this evidence any motive which could have prompted the parties to manufacture it. Had the design been to avoid the debts of Pool, he would hardly have so arranged as to provide for the issue of the patents in his own name, as well as the names of his associates. Under the peculiar facts of this case, the proof satisfies our mind that the complainants furnished the purchase money, and consequently they have a lien on the lands for its repayment. After this, with the expenses provided for by the agreement, shall have been refunded, Moody, as the purchaser of Pool's interest, is entitled to one third the remainder.

The decree of the Chancellor must be reversed, and the cause remanded, that a decree may be rendered, and a reference awarded, in accordance with the principles indicated by this opinion. Let the costs be divided between the parties in this court.

HOMER *vs.* PURSER.

1. A., supposing that he had title to a tract of land of which B. had possession, agreed to sell it to him, and executed a conveyance, with full covenants. It afterwards appeared, that A. had no title to the particular tract agreed to be sold, and that his deed to B. conveyed another tract, to which A. had title. Upon discovering the mistake, B. offered to return the deed, and to rescind the contract, which A. refused. Thereupon, B. sued at law to recover the purchase money, which he had paid. *Held,*
That he could not recover, and that equity alone could afford relief.

ERROR to the Circuit Court of Marion.
Tried before the Hon. Turner Reavis.

THIS suit was commenced by Moses Purser against James W. Homer, before a justice of the peace, to recover the sum of fifty dollars. After the rendition of judgment by the justice, the cause was removed to the Circuit Court by *certiorari.*

Upon the trial in the Circuit Court, it appeared, that the plaintiff resided on a forty acre tract of public land, and the defendant informed him that he had entered it, and requested the plaintiff to move off of it. Shortly afterwards, the plaintiff purchased the land of the defendant, and gave him fifty dollars in cash, and also gave him his note for sixteen hundred pounds of seed cotton. The defendant executed a deed with full covenants, and at the time of the sale thought that he was conveying the land on which the plaintiff resided, and the plaintiff believed he was acquiring a title to that particular land. It afterwards appeared, that the defendant had not entered that tract of land, but another piece about a mile from it, and the deed conveyed the land he had actually entered, and not the land on which the plaintiff resided, which was still vacant, but subsequently had been entered by another. After the mistake was discovered, the plaintiff offered to return the deed to the defendant, which had not been recorded, and demanded a rescission of the contract; but the defendant refused to accept it, or to rescind the contract. Upon these facts, the court instructed the jury, that the plaintiff was entitled to recover, and the defendant excepted.

Earnest, for the plaintiff in error:

1. A plaintiff holding a deed with full warranty from defendant, cannot recover back the purchase money for the land, on the ground of a fraud or mistake in the deed. Dunn v. White & McCurdy, 1 Ala. Rep. 645; Cullum v. Branch Bank at Mobile, 4 ib. 21; Bird v. Daniel, 9 ib. 302; Knight v. Turner's Ex'r, 11 ib. 636; Patton v. England, 15 ib. 71.

2. A vendee, who would defend a suit for the purchase money, must reconvey and deliver up the possession, so as to place the vendor in *statu quo*. The same doctrine will apply, when the vendee sues to recover back the purchase money.

The mere offer to deliver back the deed does not cancel the contract. The title is vested in the plaintiff by defendant's deed, and can only be divested by a reconveyance. 6 Ala. Rep. 801.

William Cooper, *contra*:

1. Homer practiced a fraud on Purser, in pretending to

sell him the tract of land on which Purser lived, and to which Homer had no title whatever; and this fraud renders the contract void. Turnipseed v. McMath, 13 Ala. Rep. 44. Parol proof is good at law to show a fraud in a written contract, as well as in equity. Kennedy v. Kennedy, 2 Ala. Rep. 588; Barnett v. Staunton & Pollard, 2 ib. 187. Ignorance of the truth or falsehood of an assertion, on the part of the speaker, if confided in by the opposite party, and material, does not alter the case; the party speaking must know what he says to be true. 13 Peters', 36; 9 Ala. Rep. 684.

2. The contract was void, for another reason. The land on which Purser lived, and which Homer attempted to sell to him, was *public land*, and therefore every contract to sell it, of whatever description, was absolutely void. Merrell v. Legrand, 1 Howard Miss. 150; Toler v. Armstrong, 4 Wash. C. C. 297; 11 Wheat. 258; 6 Wend. 648. This fraud was cognizable at law, 5 Pick. 348; 5 Johns. 500; 11 ib. 446; 8 Cowen, 370.

3. The cases cited by the plaintiff's counsel only establish the position, that the vendee, *after he has been put in possession*, cannot resist the payment of the purchase money, nor recover it back when paid, on account of incumbrances or defects of title. There the party is driven into equity, because that forum alone can do complete justice. But in this case, the vendee *has not got the possession of any land whatever* by the purchase, nor can the vendor give him the possession.

DARGAN, C. J.—The question in this case is, does the mistake in the sale of the land, connected with the subsequent offer of the plaintiff to return the deed of the defendant to him, and the offer to rescind, entitle the plaintiff to sue at law to recover the purchase money which he had paid. I am of the opinion they do not. If we allow the plaintiff to recover back the purchase money at law, the legal title to the land actually conveyed would still be in him. He may therefore hold on (at law, at least), both to the money and the land. After recovering the money, he would still be the owner of the land conveyed by the deed. The contract, therefore, at law, would not be rescinded, nor the parties placed in *statu quo*. In the case of Cullum v. The Branch

Bank at Mobile, 4 Ala. 21, it appeared, that the note sued on had been given in part payment of a lot of land purchased by Cullum of S. Andrews, and the contract was fully executed by a conveyance with full covenants. It further appeared, that Andrews had fraudulently represented to Cullum, that the lot was free from all incumbrances, when, in truth, he had previously mortgaged it, for a large amount, and by virtue of the mortgage the mortgagee, some time after the sale, took possession of the lot. In that case, as in this, the vendee, when he discovered the true condition of the title, offered to rescind the contract, which Andrews refused to do. Upon these facts, this court held, that at law a recovery must be had, and that equity alone could afford relief. The main principle on which the court relied was, that a court of law was incapable of doing complete justice between the parties, whilst the powers of a court of equity were ample for this purpose. In the case of Knight v. Turner, 11 Ala. Rep. 631, the same principle was again recognized, and, indeed, the whole current of our decisions tends to establish it. See 1 Stewart, 490; Dunn & White v. McCurdy, 1 Ala. Rep. 645.

In the case before us, a court of law is incapable of doing complete justice. It cannot order a reconveyance, or take notice of any incumbrance, that may have been created on the land actually conveyed by the plaintiff since his purchase. But equity can do this. In that forum, complete justice can be done, and protection afforded to both parties. We therefore must remit the plaintiff to that jurisdiction.

Let the judgment be reversed, and the cause remanded.

JAMES REID & CO. *vs.* McLEOD.

1. When process of garnishment is sued out against a firm, and judgments *nisi* and final are rendered against them by default, and the names of the partners composing the firm no where appear in the proceedings against them, the judgment will be reversed, and judgment rendered in the Appellate Court quashing the proceedings.
2. It is not necessary in such case that the defendant should plead the defect in abatement.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. John Bragg.

Daniel McLeod, the defendant in error, having obtained a judgment against one John Ashby, sued out a writ of garnishment against "the firm of James Reid & Co." as the debtor of said Ashby. The garnishees failed to appear, and judgment *nisi* was rendered against them, which was afterwards made final. The affidavit of the plaintiff, the writ of garnishment, and all the subsequent proceedings describe the garnishees as "the firm of James Reid & Co.;" but the names of the partners composing the firm no where appear in the record.

JOHN T. TAYLOR, for plaintiff in error, cited 8 Term Rep. 508; 1 Chitty's Pl. 255; 5 Halst. 295; 2 Munf. 349; 3 Caine's Rep. 170; 1 Penn. 75; ib. 137.

No counsel appeared for the defendant.

CHILTON, J.—The pleadings in every suit shoud set forth the names of the parties, both plaintiff and defendant, with such certainty as to enable the court to determine in whose favor and against whom to render judgment. This is an elementary rule, the observance of which is indispensable in the proper administration of the law.

Mr. Chitty in his work on Pleading (vol. 1 p. 256) says: "It must be stated with certainty who are the parties to the suit, and therefore a declaration by or against C. D. & Company, not being a corporation, is insufficient." The same principle is substantially asserted in 8 Term Rep. 508; Tomlinson v. Burke, 5 Hals. Rep. 295; Bently v. Smith, 3 Caine's Rep. 170; and Scott v. Dunlap & Co., 2 Munf. Rep. 349. In the case before us, the whole proceeding and judgment appear to be against a *firm name*, while the parties composing it are no where disclosed by the record. Such uncertain, vague proceeding cannot be sustained, and ought not to be favored.

Let the judgment be reversed, and judgment here rendered quashing the proceedings, so that the defendant in error, if he see proper, may sue out process of garnishment against the person or persons composing the firm, or negotiating in the

name and style of James Reid & Co. We would observe that this is not a case where the defendant is required to put in his plea in abatement; for it would be absurd to hold that a defendant must plead what his adversary already admits upon the record. See Coll. on Part. §§ 717 and 718. Let judgment be entered againt the defendant in error for the cost of this court and of the court below.

Judgment accordingly.

BOTT, SURV. PART., &c. *vs.* McCOY & JOHNSON.

1. A factor or commission merchant is not authorized by law to pledge the goods of his principal for his own use, and his pledgee can acquire no title to them, as against the principal, whether he dealt with the factor in ignorance of his title or not. The principal may bring trover against the factor and his pledgee, or either of them, at his election.
2. But the factor is estopped by his own tortious act, and he cannot take advantage of the violation of his authority to set aside the contract.
3. A subsequent purchaser from the factor acquires no better title than the factor himself had, and cannot recover the goods from the pledgee, although the sale was made within the scope of the factor's authority.
4. When a case is submitted upon an agreed statement of facts, the court can only decide the questions of law arising upon those facts, and it will not infer the existence of other facts from those which are admitted.
5. B. & Co. received a lot of cotton, as commission merchants, which they stored with defendants, who were ware-house men; afterwards, having obtained an advance of money for their individual use from plaintiffs, they pledged the cotton as security for its payment, and gave plaintiffs an order on defendants for its delivery; defendants acknowledged plaintiffs' title, and agreed to hold the cotton for them, and plaintiffs agreed to pay the storage on it; B. & Co. afterwards sold the cotton to T. & S., and gave them an order on defendants for its delivery; defendants delivered the cotton to them, and received it again from them, on the same day, for storage; B. & Co. paid a part of the money, which they received from T. & S. on the sale of the cotton, to plaintiffs, on an account due them previous to the pledge of the cotton; plaintiffs received the money in ignorance of the source from which it was derived, and credited it on B. & Co.'s prior indebtedness to them. Plaintiffs brought detinue against defendants for the cotton; and *it was held:*
   1. That plaintiffs' title was superior to that of T. & S.;
   2. That the receipt of the money by plaintiffs was not a confirmation of the subsequent sale by B. & Co. to T. & S., and did not entitle defendants to a credit on the amount of the recovery against them.

6. When the judge is substituted for the jury, by consent of parties, his decisions upon questions of fact will not be revised by the Appllate Court.

ERROR to the Circuit Court of Mobile.
Tried before the Hon. John Bragg.

This was an action of detinue by McCoy & Johnson against Holmes & Bott, surviving partners of Holmes, Bott & Earle, for seventy-eight bales of cotton. The case was submitted upon an agreed statement of facts, and judgment thereon was rendered in favor of the plaintiffs. The agreed statement of facts is set out at sufficient length in the opinion.

HAMILTON and SEMPLE for plaintiffs in error:

The act of an agent is the act of his principal: a sale by the factor, of his principal's goods, lodged with him for sale, operates a contract between the principal and the vendee; the title passes *directly* from the former to the *latter*, and not from the factor. 7 Mass. Rep. 319; 13 ib. 379; 6 Wheat. Rep. 79–94; 5 Serg. & R. 27; 2 Ashmead Rep. 485–513.

The principal can sue the buyer for the price (6 Cowen 186) and the buyer the principal for his damages, &c., (6 Cowen 354;) and this though the factor need not name his principal. 7 Mass. Rep. 44.

If this suit were then between the planter and Tarlton & Scott, the purchasers, the sale by Bower & Co must have been upheld; for the vendees acquired the planter's title.

But before the sale to Tarlton & Scott, Bower & Co. pledged the cotton for their own debt, to McCoy & Johnson.

By this act as against the principal, McCoy & Johnson took no title; it was a tortious and void act. A factor is not permitted to pledge. 2 Kent Com. 625, Lecture XLI; 11 Howard's S. C. Rep. 209–224, et seq.; 1 Mason Rep. 440; 4 Rawles Rep. 195; Russell on Factors 56–116, (49 Law Lib.)

And the principal could recover back the goods without tender of advances. 1 Mason Rep. 440; 11 Howard 224.

So a purchaser from the principal could recover. 1 Washington Rep. 174.

Tarlton & Scott are purchasers for value, without notice and in the strict and usual line of the trade; and though purchasers through Bower & Co., they are, in law, the purchasers of the principal, and acquired his rights. Vid. Auth's. Sup.

In comparing the title of these parties, McCoy & Johnson and Tarlton & Scott, the former have their title from Bower & Co., founded on a violation of duty and of the law by Bower & Co. The latter have the title of Bower & Co.'s principal, for value, in the course of trade, without notice of any fraud or irregularity. The former are chargeable with notice. 11 Howard Rep. 224; 11 Ala. Rep. 407, bot. page; 14 Ala. Rep. 405.

This is not like the case of an illegal sale by an administrator; in his case the law casts the title on him, but Bower & Co. never had any title to part with.

They had the possession of the cotton, but their possession was the planter's, and by transferring the possession, the pledgees became the bailees of the planter.

But the purchasers acquired the possession without any illegal act; they had, it is contended also, the right of possession, and the title.

They obtained a perfect right, unless the previous pledge of Bower & Co. in some way prevented it; but how could it? that act was void: (1 Wash. Rep. 174 and Auths. Sup.) it could become binding only by the ratification of the principal; there is no proof of ratification; there can be no presumption of ratification; for the sale to Tarlton & Scott was made in less than two weeks after the pledge by Bower & Co.

Did the misconduct of Bower & Co. work a revocation of their agency? it furnishes good ground for such revocation. There is no proof of actual revocation; but even if revoked in fact or in law, *non constat*, but it was renewed by the principal, with instructions to recover and sell the cotton.

There is no evidence upon the point; the naked fact of malfeasance by the agent exists, that does not revoke the agency in the factor.

It is conceived that under no rule of law, operating to discharge an agency, can the agency of Bower & Co. be held to be discharged, so as to defeat the right of the *bona fide* purchasers, unless it be because the pledge to McCoy & Johnson converted the planter's title to the cotton into a chose in action.

But would such a result follow in this case? The contrivances in this case were of such a character that Tarlton & Scott acquired the possession as fully as McCoy & Johnson.

The purchasers were ignorant of any adverse claim; there is no proof the planter was any wiser, and he was the seller; his sale to Tarlton & Scott, in ignorance of an adverse claim, would be binding. 2 Sumner Rep. 211; 9 Porter Rep. 479, bot. page; 5 Ala. Rep. 424; 13 Ala. Rep. 223–230.

By analogy to the decision of this court, Moore *vs.* Easly, Adm'r, 18 Ala. Rep. 622, Bower & Co. were fully authorized to undo their pledge to McCoy & Johnson by sale of the property, which was within their authority.

If this be so, then the title of Tarlton & Scott must prevail over the claim of McCoy & Johnson, and the ware-house man, having recognized the title of the former, is entitled in this suit to defend himself upon that title. 5 Taunt. Rep. 759; 20 Eng. Com. Law; 1 Barn. and Ad. 450; and Story Bail. 1st Ed.; 6 Wharton Rep. 418; 6 Watts & Serg. 75; 9 Ala. Rep. 748.

The case of Ogle vs. Atkinson, 5 Taunt. 759, is said to be over-ruled, and that a ware-house man or bailee shall not be permitted to deny the title of his principal.

As a general rule, this is true; but if the title of the principal is founded in a fraud, the bailee is not estopped to recognize the right; he is not compelled to make himself a participator in it. Cowper Rep. 595; 23 Eng Com. Law, 9 Bingham Rep. 382; Smith Merc. Law, p. 83 note K; Law Lib. p. 102 of Am. Ed.; Story, Bailments § 450–582–266, and Story, Agency § 217 note.

The course pursued in this case, is the course of proceeding recognized as the usual and proper mode in the English practice, in cases situated as this is. Vide opin. Ld Chr. Brougham, p. 191 bot., 13 Eng. Ch. Rep.; 2 Russ. and Myln. 606–609; 4 Sim. Rep. 218.

CAMPBELL for defendants:

1. We contend, that the meaning of defendants' contract is, that they should hold the cotton safely, and that it is not in their power to maintain a discussion with the plaintiffs in reference to the title of the plaintiffs.

2. The duty of the plaintiffs in error, (ware-house men,) was to surrender the cotton to McCoy & Johnson, and when an adverse claim is set up they should notify their principals of its existence, and not yield to it without resistance.

3. We contend, that the ware-house men cannot in this action hold to the cotton, defending themselves under the adverse title of the second purchasers from Bower. Story on Bailments, §§ 266–450–582; 2 Cowp. Rep. 244–344; 6 Adol. & E. 515; 2 B. & C. 540; 47 Bing. 339; 10 Bing. 246; 9 Price 269; 44 Law Library 353–4; 18 Vermont 186–190; 3 Pick. 38; 8 Wend. 610; 2 Mylne & Craig Rep. 1; 11 Paige 365; 9 Ala. Rep. 317; 12 Ala. Rep. 520.

4. We contend further, the defendants are not excused by the ignorance or inattention of their clerk, in issuing the receipts; it was done in the course of his employment.

5. The ware-house men are not excused from delivering the cotton to their principals, on the ground that Bower, under certain circumstances might have made a bargain for the sale of the cotton. The evidence of ownership was the ware-house receipts, and nothing that Bower could have done, divested their property without their consent and knowledge. For Bower had not the *indicia* and evidence of property, and must have applied to them to get them. These indicia of title were not surrendered in this case, nor was the consent of McCoy & Johnson given to the sale.

6. The payment of a portion of the money taken on account of the cotton, on a debt due to McCoy & Johnson by Bower & Co., cannot be received in evidence as an answer to their claim. They did not recognize the sale nor receive this money in fulfilment of Bower's obligation to them. The conversion was complete by Bower, and the payment was independent of this transaction.

The cases cited do not remove this case from the operation of the principle for which we contend:

1. A ware-house man, or other bailee, may relieve himself from liability when property has been taken from him by a legal proceeding, or exterior force.

2. When the bailee and his principal were parties to a fraud.

3. When the ware-house man has been fraudulently imposed upon by his principal, so that erroneous acknowledgments were made, as in the cases cited. 9 Ala. Rep.

4. The authorities no where say that a bailee can voluntarily, and without notice to the bailors, who are innocent hold-

ers of title, submit to a superior title in a third person, and can defend a continuance of his possession under that title.

The cases in Pennsylvania proceed entirely upon the fraud of the principal. The other cases, on the *vis major* under which the property was taken.

5. The facts do not show that McCoy & Johnson surreptitiously obtained the delivery order, or were in collusion with Bower & Co. to commit a fraud; or was a party to a fraud, upon the planter or Bower & Co., or Tarlton & Scott; nor is there any pretence of such a fraud having existed, alleged by the planter, Bower & Co, or Tarlton & Scott.

DARGAN, C. J.—The cotton sued for was received by William Bower & Co., as commission merchants, from the planters who raised it. Bower & Co. stored the cotton with the defendants, Holmes & Bott, who were warehouse keepers, and it was entered on the books of the warehouse in their name. Shortly afterwards Bower & Co. obtained an advance of money for their own benefit from McCoy & Johnson, and pledged the cotton as a security for its payment. They gave to Johnson & McCoy an order for the cotton, which being presented to the defendants, they recognized the title of the plaintiffs, and their clerk executed to them a receipt showing that they undertook to hold the cotton for the plaintiffs, who agreed to pay the storage. After this, Bower & Co. sold the cotton to Tarleton & Scott, and gave them also an order for its delivery. The defendants recognized the title of Tarleton & Scott, and delivered them the cotton, which was re-stored with the defendants on the same day. The plaintiffs demanded the cotton of the defendants, but they refused to deliver it; whereupon this suit was brought whilst they held the cotton as the property of Tarleton & Scott. The question of law which we propose to examine arising on these facts is, which title is to be preferred, that of the plaintiffs, or that of Tarleton & Scott.

The principle cannot be doubted, that a factor or commission merchant is not authorized by law to pledge the goods of his princpal for his own use. The party receiving such a pledge and advancing his money, acquires no title as against the principal. Nor is it material in such a case, whether the

pledgee knew that he was dealing with a factor or not; if he knew the fact, he was bound to know *that by law* the factor had no authority to pledge the goods of his principal; if he did not know that the person with whom he was dealing was a factor, still his want of knowledge of this fact could not extend the authority of the factor. Story on Agency, § 225, and cases there cited. As such an act is not within the ordinary powers of a factor, it is clear that it cannot work a divestiture of the title of the principal; and he may pursue the goods in the hands of the pledgee, or may bring trover against both the pledgee and factor, or either of them, at his election. Story on Agency § 437.

But this violation of the factor's authority is injurious to the rights of the principal alone; he may ratify or confirm the act at his pleasure; and if he is content therewith, no one else can complain. Certainly it would be contrary to all rule, to suffer the factor himself to allege his own tortious acts as a ground for setting aside the contract. He cannot bring trover or detinue in his own name, and recover of the pawnee the goods, on the ground that he had tortiously violated his authority, and thereby injuriously affected the rights of his principal. I apprehend that no case can be found, where a trustee or a bailee, who has converted the goods intrusted to his care, has been allowed to recover the goods from his vendee, on the ground that he had violated his authority in making the sale. But on the contrary, every one who undertakes to transfer goods, whether it be by way of pledge or sale, impliedly stipulates that he has the authority or the right to do so; and he must be held estopped by his act, and cannot and ought not to be allowed, to allege his *own violation of authority* to set aside the transfer, or to recover the goods. This principle of law has frequently been recognized by this court. In the case of Pistole v. Street, 5 Porter, 64, an administratrix having intermarried, her husband sold a slave belonging to the estate of the decedent, without authority from the County Court, and after the death of her husband she brought suit against her husband's vendee, to recover the slave, on the ground that he was sold without authority. But this court held, that the act of her husband must be considered as her own; and although the creditors and distributees

were not without remedy, yet she was estopped, and could not set up her want of authority to sell. Again: in the case of Fambro v. Gantt, 12 Ala. 298, it was held, that though no title passed to the purchaser by a private sale of the property of an estate by the administrator, yet the administrator was estopped from recovering it in his own name.

These authorities, as well as the principle on which they rest, to my mind are conclusive, to show that Bower & Co. could not recover the cotton from McCoy & Johnson; for they cannot set up their own tortious act on the rights of a third person, to set aside their contract. As to them it is valid, and their principal alone, who was injured by it, can set it aside. The necessary sequence from this proposition is, that if Bower & Co. cannot themselves recover the cotton of McCoy & Johnson, they cannot by a sale in their own name enable another person to do so. This would be to allow them to do through another, what they could not do themselves. The cotton was in the possession of the plaintiffs at the time of the sale to Tarleton & Scott, and by virtue of a contract that gave them a good title as against Bower & Co.; the sale to Tarleton & Scott was in pursuance of the original authority which Bower & Co. had abused; but so far as the record discloses, the planters to whom the cotton in fact belonged, have not complained; they may be content with the transfer by way of pledge. Under such circumstances, neither Bower & Co. nor any one claiming under them, can allege the injury done to the owners of the cotton, by a tortious violation of the authority intrusted to Bower & Co., to set aside the contract by which McCoy & Johnson obtained the possession of the cotton. We will not say that the owners of the cotton might not in their own name have sold it, and thereby enabled their vendee to recover. But we feel assured that Bower & Co. could not, by virtue of their original authority, sell in their own names, and enable their vendees to set aside a contract which was at least binding on them. We therefore come to the conclusion, that the title of McCoy & Johnson is superior to that of Tarleton & Scott. They both originate from the same source, to-wit: from Bower & Co.; and the title of the plaintiffs is valid against all the world, except as against the original owners of the cotton, who alone were

injured by the tortious act of their factors. But as they have not complained of it, *no one else can.*

This view of the case renders it unnecessary, to examine in what cases, and under what circumstances, a bailee may defend himself when sued by his bailor, to recover the goods intrusted to his care, by interposing a superior title in another which he, the bailee, has recognized.

It is however insisted, that the facts agreed upon would warrant the inference, that Bower & Co. were acting as the agents of McCoy & Johnson in making the sale to Tarleton & Scott. It is a sufficient answer to this to say, that where the facts of a case are agreed upon, and the questions of law alone are submitted to the court for its judgment, we can only respond to the questions of law arising upon the admitted facts. The inference of one fact from another is a question of fact, and not of law, and this inference must be drawn by a jury; and it would be traveling out of the province of the court, as well as of the agreement in this case, if the court was to infer another fact, and pronounce the law arising thereon.

It was also shown, that Bower & Co. paid to the plaintiffs a considerable portion of the money received from Tarleton & Scott on the sale of the cotton, upon an account due by them to the plaintiffs anterior to the pledge of the cotton; but the plaintiffs were ignorant of the source from whence the money came at the time they received it. On this evidence it was contended, that the act of the plaintiffs in receiving the money ought to be construed as a confirmation of the sale, or at all events, as a credit upon the amount they otherwise would be entitled to recover. But as the plaintiffs did not know that the money paid to them was part of the proceeds of the cotton, they did not, by receiving it, confirm the sale to Tarleton & Scott; and as the amount received by them was credited upon a prior indebtedness, the amount they advanced to Bower & Co. upon the cotton is still due them.

In view of all the facts, we see no error in the judgment, and it must be affirmed.

NOTE.—A re-hearing was granted in this case. and the following opinion afterwards delivered:

PER CURIAM.—This cause has been re-argued, and we are satisfied that the principle of law pronounced in the opinion is correct. In reference to the question of fact, whether Bower & Co. were not the agents of McCoy & Johnson in making the sale to Tarleton & Scott, we will only add, that when the judge is substituted, by consent of the parties, in lieu of the jury, we will not revise his judgment upon the facts. If the evidence be conflicting, and he decides against the weight of testimony; or if it would have justified an inference of fact which the court refused to draw, we will not reverse his judgment, merely because we could, or might have come to a different conclusion of fact. Etheridge v. Malempre, 18 Ala. 565.

CARPENTER *vs.* GOING, ADM'R.

1. A voluntary sale, without any legal compulsion, by an executor *de son tort*, confers on his purchaser no better title than he himself had.
2. A voluntary purchaser from an executor *de son tort*, when sued in trover by the rightful administrator, cannot show, in mitigation of damages, that since his purchase, the executor *de son tort* has paid debts which the administrator was bound to pay in due course of administration.
3. Whether under our statutes, the executor *de son tort*, when sued in trover by the rightful administrator, can show such payments in mitigation of damages, *Quære?*

ERROR to the Circuit Court of Greene.
Tried before the Hon. John D. Phelan.

J. B. CLARKE, and WATTS, JUDGE, & JACKSON, for plaintiff:

1. The action of trover is an equitable action, and the defendant has a right to give in evidence any fact or facts which will show that the plaintiff ought not to recover full damages. Strong v. Strong, 6 Ala. Rep. 345; Plevin v. Henshall, 10 Bing. 24, (25 E. C. L. R. 17); McGowen v. Young, 2 S. & P. 160, 170, 171; Baldwin v. Porter, 12 Conn. Rep. 473; Sedgwick on Dam. 519.

2. An executor *de son tort* has a right to give in evidence,

in mitigation, the payment of the *bona fide* debts of the deceased, so as to reduce the damages to a nominal sum, or indeed, defeat a recovery. Mountford, Adm'r. v. Gibson, 4 East, 441; Hostler's Adm'r. v. Scull, 2 Haywood, 179; 4 Bacon's Ab., 32, 33; Saam v. Saam, 4 Watts, 432; 2 Saunders' Pl. & Ev., 513; 14 Pick. 356; 6 Mass. 323.

3. And the purchaser of property from an executor *de son tort* is at least entitled to make any defence that his vendor could make.

S. F. Hale, for defendant:

The title to personal property of a deceased testator or intestate vests in the personal representative, when appointed, and has relation back to the death of the testator or intestate; and a sale thereof, if made by any other person, or even by the personal representative otherwise than as provided by the statute, is void, and confers no rights upon the vendee. 12 Ala. Rep. 532; 15 ib. 707; 9 ib. 912; 4 Ala. 443; 12 ib. 298; 10 Peters', 161; 4 Munford, 194; 4 Har. 168; 18 Ala. Rep. 828.

And the sale being void, the personal representative can either bring an action of detinue, and recover the specific property, or an action of trover, and recover its value from the vendor, notwithstanding the proceeds may have gone to the payment of the debts of the testator. 4 Har. & Johnson, 394; 4 Harrington, 168; 2 Brevard, 307.

Carpenter was guilty of a conversion of the slave, and liable for his full value in an action of trover the moment he converted him to his own use; and no act of his, without the consent of the party aggrieved, can defeat the action. 21 Wendell, 396; 17 ib. 91.

The doctrine of recoupment does not apply, except in cases where the demands spring out of the same transaction, and are between the same parties. 13 Ala. Rep. 595; 6 ib. 82; 15 Wendell, 158.

And Mrs. Woolfolk paid the debts of Woolfolk, the testator, if any were paid, and not Carpenter; and a court of law cannot subrogate Carpenter to her rights, whatever they may be.

A bill of exceptions is always taken most strongly against

the party excepting, and every intendment will be made, consistent with the facts set out in the bill of exceptions, to sustain the judgment of the court below.

So far as this court is informed by the bill of exceptions, the estate of Woolfolk is wholly insolvent; and if that be so, and the plaintiff in error is allowed to reduce the amount of the damages for the conversion of the slave, by the amount of the proceeds thereof that may have been appropriated in payment of the debts of the testator, it will be permitting the parties, by an improper intermeddling with the estates of deceased persons, to prefer one creditor to another, and thereby defeat the whole policy of our laws upon that subject. 2 New Hampshire, 477.

If a rightful administrator had made the sale without an order of court, the sale would have been void, and have conveyed no title. Surely, then, a sale made by a person who is not rightful administrator, without an order of court, cannot confer a title.

It is said, that trover is an equitable action, like assumpsit. Now, suppose that an action of assumpsit had been brought against Carpenter for the value of the slave, could he set off against that claim money paid by Mrs. Woolfolk in payment of debts of the estate, without showing it was done at his instance or request, or that the administrator had claimed the benefit of such payment; in other words, can a wrong doer take the property of a third person in payment of his debt, without his consent, and thus defeat the rights of the true owner, without his consent or acquiescence?

DARGAN, C. J.—This was an action of trover, brought by Alfred E. Going, as administrator *de bonis non* of Thomas Woolfolk, deceased, against Thomas Carpenter, to recover damages for the conversion of a slave, which belonged to the decedent at the time of his death. The defendant, for the purpose of mitigating the damages, offered to prove the following facts: Thomas Woolfolk, before his death, executed his last will and testament, whereby he appointed his wife executrix, and made her his sole legatee during her widowhood. After his death, the widow proved the will, which was admitted to probate, but did not take out letters testa-

mentary, or of administration, and shortly after the probate of the will, she advertised several of the slaves belonging to the estate for sale. At this sale the defendant became the purchaser of the slave in controversy, and paid for him a thousand and one dollars. He further offered to prove, that the money thus paid was applied by the widow to the payment of the *bona fide* debts owing by the testator at the time of his death. The plaintiff objected to the introduction of this evidence, and his objection was sustained; whereupon the defendant excepted.

We think the counsel for the plaintiff in error properly admitted, that under our statutes, the sale by the widow gave the defendant below, who is plaintiff in error, no title to the slave, as against the rightful administrator; and the only question, therefore, is, was the testimony admissible in mitigation of damages? We can consider Mrs. Woolfolk in no other light than as an executrix *de son tort;* and consequently she had no legal title to the slave in question. Having none herself, as against the lawful administrator, she could impart none to her vendee. It would never do to allow a purchaser to obtain a good title to the goods of the deceased, as against the lawful administrator, by the *mere act of sale,* by an executor of his own wrong. I intend, however, to confine this remark to the precise words I have expressed, for there may be cases in which a purchaser may get a good title; as if judgment be rendered against an executor *de son tort*, and the goods of the deceased are sold under an execution issued thereon, the title of the purchaser may be valid. This, however, I do not intend to decide; and I have stated the supposed case, to show that we now hold that the mere voluntary sale by an executor *de son tort*, without any legal compulsion, will not confer on his purchaser a better title than he himself had.

The counsel for the plaintiff in error, admitting this proposition to be true, contend, that when an executor *de son tort* is sued in trover by the rightful administrator, that though he cannot defeat the action *in toto*, yet he may show that he has paid the debts which the administrator was bound to pay in due course of administration, and if such payments equal the value of the property sold, the administrator can recover only nominal damages. I admit that this is the settled law

of England, and it has been recognized in several of the United States. See Williams on Executors, Vol. 1, 144; Bacon Ab. tit. Executors & Administrators, Vol. 4, 32; Toller on Executors, 365; Viner's Ab. Vol. 11, Book E. 215; Saam v. Saam, 4 Watts, 432; Hostler v. Seull, 2 Haywood, 179. But the question is, can the purchaser from the executor *de son tort*, be substituted to this equitable defence, that the executor *de son tort* might himself make. We think that he cannot, *at least in a court of law.* We do not intend to deny the common saying, that trover is an equitable action, and that the plaintiff can recover damages only to the extent of the injury actually sustained; as if the mortgagee bring trover against the mortgagor, he can recover only the amount of the debt; or if goods be sold illegally to discharge a lien, the owner can recover of the purchaser only the value of the goods, deducting the amount of the lien. But we hold, that this equity or right must be personal to the defendant himself; that is, it must have existed in him at the time he became liable to the action, or if acquired afterwards, it must have been acquired by his own act; for at law he cannot be subrogated to the equities of another, which have sprung up after the liability of the defendant has become perfect. Let us test this principle by the facts of this case. It is clear, that at the time of the defendant's purchase, when he paid the price to Mrs. Woolfolk, he was then liable in trover (if there had been a lawful administrator), to the extent of the value of the slave, for at that time no equitable defence existed, either in his favor or in favor of Mrs. Woolfolk; and to allow him to set up the subsequent acts of Mrs. Woodfolk as his equity, would not only be to subrogate him to the rights of another, but would often lead to inquiries so embarrassing and complicated, that a court of law would never be assured that the ends of justice had been attained. I do not remember a case where one has been subrogated to the equitable rights of another, in a court of law, and I am unwilling to take the first step, even to reach the supposed justice of a particular case; especially when we see that such subrogation would or might lead to inquiries far beyond the simple issue, and involve inquiries respecting the rights of others not before the court, which a court of law would not only be unable to pro-

tect, but would be unable to do full and complete justice in the particular case.

It may, however, be said, that the purchaser from a mortgagor, or from one who held the lien on the chattel, can reduce the recovery to the extent of the debt or lien, and that this is a mere subrogation at law to the rights of him from whom he purchased. But it must be borne in mind, that the purchaser acquires this right by his own act, to wit: the act of the purchase, and the chattel comes to his hands clothed with it; he therefore asserts his own equity in making that defence, and not the equity of another, arising after his liability is fixed or perfect, and from an act to which he is not privy.

I am satisfied, that the defence ought not to be allowed at law, and it is not now necessary to say whether it can avail the party in a court of equity; but if he can insist on it at all to reduce the amount of the recovery, it must be in that court, and not in a court of law. I have said, that the executor *de son tort*, when sued in trover by the lawful administrator, may reduce the damages, according to the English law, by showing that he has paid debts which the administrator, in due course of administration, would have been bound to pay. I do not, however, intend to decide, that under our statutes, this can be done at law, even by the executor *de son tort* himself; but even conceding that he may, we all concur in this, that his vendee cannot, by showing payments after his purchase.

Ex Parte PUTNAM.

1. A motion to quash an original attachment is addressed to the sound discretion of the primary court, and its discretion will not be controlled by *mandamus* from the Appellate Court.
2. When an amendment is allowed to an original attachment by the primary court, *mandamus* does not lie to vacate the amendment.

Motion for a *mandamus* against the Circuit Judge of the Eighth Judicial Circuit.

DARGAN, C. J.—An attachment was sued out at the instance of William H. Gulleland and others against James M. Putnam, which was levied on certain goods as the property of the defendant. At the return term of the writ, the defendant moved to quash it on two grounds: first, that the affidavit was insufficient; and, secondly, that it was not directed to any officer. The plaintiffs also moved to amend the attachment, by adding the proper direction. These motions were heard at the same time, and the court granted the motion to amend, and refused the motion to quash. A motion is now made for a *mandamus*, to compel the Circuit Court to vacate the amendment, and to quash the writ.

In the case of Reynolds v. Hall, 3 Ala. 57, it was decided that a motion to quash or set aside process, was addressed to the discretion of the court, and the refusal to grant the motion was not a matter that could be assigned as error. This decision has been recognized in the subsequent cases of Massey v. Walker, 8 Ala. 167; Ellison et al. v. Mounts, 12 Ala. 472. Now, if the motion to quash is addressed to the legal discretion of the court, we think it clear that a *mandamus* will not lie to control that discretion, for if we compel the Circuit Court by this process to grant the motion to quash, then the granting of the motion is no longer a matter of discretion, but is compulsory on the court when made, if the writ be defective.

Nor do we think the writ should go, to compel the Circuit Court to vacate the amendment that was allowed. We will not at this time determine whether the defect was amendable or not, for whether it was or not, the result of this motion must be the same. If there was no error in allowing the amendment, the writ of course could not go; and if the amendment was improperly allowed, it may be reviewed by writ of error, after the final judgment shall have been rendered in the cause, unless the defect be cured or waived in the subsequent proceedings. Should we at this time grant the writ, and thereby in effect decide that the attachment was defective, it could have no effect; for the attachment itself would not be quashed or dissolved by vacating the amendment, but would remain as it was before the amendment was allowed; and the defect of the writ could only be brought before this court by

writ of error. It may be proper to observe, that we have frequently intimated that a *mandamus* would lie, to revise the action of the Circuit Court in quashing or refusing to quash ancillary attachments, but the question has never been directly decided on an application for the writ; but conceding that it would be granted in such a case, it is quite certain that it ought not to be granted to compel the court to quash an original attachment, which is the leading process of the cause, upon a motion merely, which is always addressed to the discretion of the court.

Motion refused.

GRIFFIN ET AL. *vs.* OSBOURNE & CO.

1. When a cause is withdrawn from the docket, and leave given at the same time to reinstate it, but the cause is not reinstated and no steps are taken in regard to it until after the lapse of two years, the cause is discontinued, and cannot then be reinstated.

ERROR to the Circuit Court of Talladega.

Tried before the Hon. E. Pickens.

RICE & MORGAN, for plaintiff in error.

L. E. PARSONS, *contra.*

DARGAN, C. J.—This was a motion against Griffin, as sheriff, and his securities, to recover a sum of money which he had collected on an execution, and failed to pay over on demand. The cause had been regularly continued until the Fall Term, 1848, when the motion was withdrawn and a judgment for cost was then rendered against the plaintiffs, but at the same time that the motion was withdrawn, leave was given to the plaintiffs by the court to reinstate it. The motion, however, was not reinstated, and nothing further was done until the Fall Term, 1850, at which term the plaintiffs moved the court to reinstate the motion *nunc pro tunc*, and showed, by the motion docket, that at the same time

the motion was withdrawn leave was granted to reinstate it. The defendants resisted the motion to reinstate the case upon the docket, and insisted that the suit had been discontinued. The defendants' objection, however, was overruled, and the cause was placed upon the docket, to which the defendants excepted; a trial was then had, and a judgment was rendered in favor of the plaintiffs. To reverse this judgment a writ of error is prosecuted to this court.

The case of Drinkard v. The State, decided at the present term, is conclusive to show that this cause was discontinued, and that the court should not have reinstated the case and proceeded to trial, in opposition to the defendants' objections. The motion, by the judgment that was rendered at the Fall Term, 1848, was finally disposed of, unless the plaintiffs saw fit to have it reinstated and continued as a cause in court; but nothing was done for two years afterwards, and to allow them then to reinstate the cause and proceed to trial would be, to introduce a practice not warranted by law, and which might often work serious injury to the opposite party.

It is, however, contended that the motion to reinstate the cause upon the docket is in the nature of a motion to amend the judgment *nunc pro tunc*, and after it was granted the cause must be considered as if it had been regularly continued by operation of law. It is, however, only necessary to observe, that the judgment rendered at the Fall Term, 1848, was not in fact set aside at that term, but permission or leave was only given to have it done; and the plaintiffs not having availed themselves of the privilege of setting aside the judgment that had been rendered, for two years, they must be considered as having abandoned the cause. The court erred in reinstating the case and proceeding to trial, in opposition to the defendants' objections.

Let the judgment be reversed, but the cause will not be remanded.

TILLER *vs.* SHEARER.

1. A party who, for a sufficient legal consideration, signs his name to a promissory note after it is due, may be declared against as a maker. (Chilton, J. and Ligon, J., *dissenting.*)

ERROR to the Circuit Court of Sumter.

Tried before the Hon. Turner Reavis.

Shearer brought an action of assumpsit against Tiller, in the Circuit Court of Sumter, on a note dated 20th October, 1848, payable to Wm. Brown or order, on the 1st day of February, 1849. This note was made, on the day it bears date, in the State of Tennessee, and was subscribed by A. G. Loftin and Eldridge Loftin. In June after the maturity of the note, Brown came to Livingston, in Sumter County, where the Loftins resided, to collect it. They failed to make payment, and from information received by Brown, he was led to doubt the solvency of the Loftins, and threatened to sue them. A. G. Loftin then introduced him to Tiller, who represented the Loftins to be solvent, and urged Brown not to sue them, lest it might injure their credit. Tiller then proposed, that if Brown would forbear to sue the Loftins on the note until about the 1st of September following, he would sign the note, and become liable for its payment after that time, which Brown promised to do, and Tiller subscribed his name to the note immediately below those of A. G. and Eldridge Loftin. The original consideration of the note was, the sale of two slaves from Brown to A. G. Loftin, in Bedford County, Tennessee, with which Tiller had nothing to do, and of which, according to the proof, he knew nothing until long after the note was due. On the trial in the court below, Shearer, who was assignee of the note, read it to the jury, and there rested his case, and the defendant then offered the deposition of Brown, the payee in the note, which was read without objection, and revealed the state of case set forth above.

Upon this evidence, which was all the evidence in the case, the defendant requested the court to charge the jury, that if they believed the witness Brown, they should find for the

defendant. The court refused to give the charge requested; but charged the jury, that if they believed the evidence they should find for the plaintiff. To the refusal to charge as requested, and to the charge given, the defendant excepted, and here assigns them as error.

WM. H. GREENE, for plaintiff in error.

BLISS & BALDWIN, *contra.*

DARGAN, C. J.—I think the case of Hullum v. The State Bank, 18 Ala. 805, is conclusive to show that there is no error in the case before us. In that case Hullum put his name on the back of a bill of exchange, that was over due and had been protested, and the testimony tended to show that he had endorsed his name on the bill upon a sufficient consideration, and intended to assume the character and position of an endorser whose liability was fixed. A majority of this court, as it was then organized, held, after all the consideration we were able to bestow upon the question, that inasmuch as Hullum had by his contract assumed the position and character of an endorser, whose liability was absolute, the holder of the bill might so treat him in his declaration.

So, in the case before us, the defendant intended to assume the character of a maker of the note, and his contract, by which he assumed that position, is founded on a legal consideration; and again a majority of the court think that he may be so treated. Indeed, the only written evidence of the contract is his name to the note as a maker; how, then, did he intend to stand in reference to it? The answer must be, as a maker; that was then his contract, that he would be bound as one of the makers of the note, and I can see no injustice nor legal objection in allowing the plaintiff to treat him as a maker. I will not refer to the authorities in support of this position; they will be found in the case of Hullum v. The Bank, supra., and time and reflection have but confirmed me in the opinion I then delivered.

There is, however, another view of this case, which, in my judgment puts the question beyond doubt; there is no plea *of non est factum, verified by affidavit;* the defendant, therefore, has admitted by the pleadings that he executed the note as

described in the declaration; his proof, therefore, could only be received to show a failure of consideration, payment, &c., but not to show that he did not execute the note as alleged. But the proof, instead of showing a failure of consideration, shows a sufficient legal consideration; the contract, therefore, which is declared on, is admitted by the pleading, and the proof shows this contract to have been founded on a sufficient consideration; nothing more can be required to entitle the plaintiff to recover.

Let the judgment be affirmed.

LIGON, J.—It is the opinion of a majority of the court, that there was no error in the action of the court below, in refusing the charge asked, or in giving the one excepted to. Regarding the note as the best evidence of the intention of the parties to it, the conclusion is drawn, that as Tiller appears from its face to be an original promisor, the plaintiff below had a right to treat him as such, and sue him in that character. They deem the case of Hullum v. State Bank, 18 Ala. Rep. 805, a fair exposition of the law of such cases, and conclusive of this. In that case, the Chief Justice, after considering the objections, arising out of the proof, to the propriety of charging Hullum as an endorser, and proceeding against him as such, goes on to say, "I admit there is great diversity to be found in the authorities, respecting the nature and character of these irregular endorsements. But, after the best consideration I am able to give the question, I think the correct rule is this, that the nature of the contract and the extent of the liability of the party are to be ascertained by his intention, as shown by the evidence, in making the endorsement. If the party endorsing the note intended to create a liability as guarantor only, he must be so treated and so sued, to enable the plaintiff to recover; if he intended to create a liability as endorser, he must be so treated. This is the conclusion to which Judge Story came, after a review of most of the conflicting American authorities, Story on Prom. Notes, § 479. Governed by this rule, which is the principle that governs in all contracts, I feel constrained to hold from the evidence, that the defendant intended to stand in reference to the bill as an endorser whose liability was fixed. This is the

nature and extent of his contract in putting his name on the back of the bill, and I see no reason why he should not be treated as such." The same conclusion is drawn in this case, that inasmuch as Tiller subscribed his name to this note, he will be held to have intended to bind himself in the same manner, and to the same extent, that the original makers were bound.

While I agree perfectly that the general rule is, as it is stated in the extract from the case of Hullum v. State Bank, yet, with all deference to the opinion of the Chief Justice, and the associate Judge who concurred with him in the decision of that case, I am constrained to deny that it was rightly applied in that case, or that the conclusion arrived at in this, is justified by the proof, or can be sustained either on principle or authority. In the case cited from 18 Ala. Rep. the objections to the conclusion of the majority, embodied in the dissenting opinion of Justice Chilton, appear to me unanswerable.

I am persuaded that the error, in both cases, arises from allowing *too much* weight to the written evidence of the contract between the parties, and attaching *too little* importance to the parol proof, by which that contract is explained and established. That a party must be charged in the character he assumes in his contract, and to the extent to which he intended to bind himself, are propositions which I do not controvert. But that character and liability are both to be ascertained by the proof, not by the written evidence alone, but by all the proof in the case. *Prima facie*, in the case under consideration, Tiller is to be regarded as a joint, or a joint and several promisor with the Loftins; but when the testimony of Brown is heard, this *prima facie* presumption vanishes, and the true character of his liability is revealed. What is it? That of guarantor, and the consideration of his guaranty is, that Brown will not sue the Loftins, on their note to him, until after the first of September, 1849, and as evidence of his intention to be thus bound, he subscribes his name to the note. The consideration for which the note was given would not, under the proof in this case, have been sufficient to charge Tiller with its payment, (and none other can be relied on by the plaintiff in his present action,) for it is well

settled, "that if one promise, in consideration of a credit already given, or of a debt already existing, it is an executed or past consideration, and creates no liability on the part of the promisor." Jackson v. Jackson, 7 Ala. Rep. 791, and authorities there cited. Here the negroes, which formed the consideration of the note given by Loftin to Brown, which is the foundation of this suit, had been delivered to Loftin at least nine months before Tiller ever saw Brown, or had any connection whatever with the transaction. The note had also been given, and was several months past due before his connection with it commenced.

I have made an extensive examination of cases analogous to this, and I have been unable to find one, (except that of Hullum v. State Bank,) in which a party, who has become bound to pay the debt of another which was past due when, for some new and sufficient consideration, he undertook to pay it, has ever been proceeded against as a joint promisor with the original maker of the note. Such persons are invariably considered and treated as guarantors, and proceeded against accordingly. In such cases too, the plaintiff must aver and prove the consideration on which the guaranty is founded, or he cannot recover. Sage v. Wilcox, 6 Conn. 81; Tenney v. Prince, 4 Pick. 385; 1 Gill. & John. 427; 4 Johns. 280; Beebee v. Moore, 3 McLean 387; 1 Strobh. 40; 16 Ohio 1; 5 Smedes & Marshall 627.

That parol testimony is admissible, to prove the terms of such agreements, is abundantly shown by the case of Hullum v. State Bank, supra, and the authorities cited to this point. In this case it was received without objection, and, with the promissory note, formed all the proof in the case. The contract thus proved was different from the one declared on, and so long as we regard the rule that the *allegata et probata* must correspond in order to justify a recovery, I am unable to see how the charge of the court in this case can be sustained. The charge must be predicated on *all the proof* in the case, and had this rule been followed here, my decided opinion is, that the charge refused was the one which should have been given.

I should always distrust the accuracy of my conclusions, when they would lead to the solecism, not say absurdity, of

holding that a party could intend, by subscribing his name to a note four months after it was due, to bind himself to pay it on an antecedent day. And such is the case here; Tiller never saw or heard of the note sued on until June, 1849, when he subscribed his name to it, and yet, by the ruling of this court, and the court below, and in the face of clear and unequivocal proof to the contrary, it is held that he made it in October, 1848, and promised to pay the sum named in it on the first of February, 1849.

It is no answer to this to say, that he intended to bind himself for the payment of the whole sum due, with interest; this may be, and is admitted; but then he was not to pay, or be liable to pay it until after the first day of September, 1849; and when, in a declaration, he is charged with having agreed and promised to pay it on the first of February, 1849, he might well plead, that he did not undertake and promise in manner and form complained of, and the proof would abundantly sustain his plea.

The plaintiff would sustain no loss by being compelled to a non-suit, which his own temerity would not deserve. He must be presumed to have known the character of the defendant's liability before he brought his action, and should be held to pursue him rightly; had he done so, he would have been compelled to have proved the consideration for the guaranty, but by being permitted to maintain his present action, he is relieved from the onus of such proof.

The record does not advise us what pleas were interposed in the court below; but it has been held in this court, that when the judgment entry shows that the parties appeared, and there is a finding by the jury, this court will presume it was on a proper issue, although no plea appears in the record, Lucas v. Hitchcock, 2 Ala. Rep. 287.

In ascertaining what plea was proper in the court below, so that it may be supplied by presumption or intendment in this court, I know no better rule by which to be guided, when the bill of exceptions sets out all the testimony, and it is shown that none of it was objected to by the counsel of the party against whom it was offered, nor ruled out by the court, than to conclude that such proof was pertinent to the issue made by the plea. Guided by this rule in the present case, it

is fair to presume, that the defendant below had interposed the plea of want of consideration. If this be so, then the case of Jackson v. Jackson, 7 Ala. Rep. 791, is an authority directly in point to show that the plaintiff below could not recover in his action on the note.

Thus, whether the plea be non assumpsit or want of consideration, the proof in the record, which was received and allowed to go to the jury without objection from any quarter, in my opinion clearly shows, that the plaintiff is not entitled to recover in this action.

I do not think it necessary further to extend this opinion; but differing as I do from the conclusion to which a majority of my brethren have arrived, I could not, in justice to the view I entertain of the law of the case, remain silent or say less.

CHILTON, J. concurs with Ligon. J.

WAINRIGHT & TWELVES *vs.* SANDERS.

1. A steamboat being in the possession of the sheriff under a writ of seizure was replevied, tho stipulators entering into bond to pay the judgment which might be rendered on the libel, and the boat was delivered to them. They afterwards re-delivered her into the possession of the sheriff, and he returned the writ of seizure, (showing these facts in his return,) and also the bond given by the stipulators. Judgment was afterwards rendered in favor of the libellant, and a sale of the boat was decreed to pay the judgment out of the proceeds. *It was held,*

   That the decree might be amended at the next subsequent term *nunc pro tunc,* by setting aside the order of sale, and rendering a decree upon the bond against the stipulators.

ERROR to the City Court of Mobile.

Tried before the Hon. Alex. McKinstry.

Pitman Sanders filed his libel in the City Court of Mobile, against the steamboat Arkansas, No. 5, upon which a writ of seizure was issued, and the boat taken into possession by the sheriff. Wainright and Twelves entered into bond, by which they stipulated to pay the judgment that should be rendered

on the libel, and the boat was delivered to them. After this they re-delivered the boat into the possession of the sheriff, and he returned the writ of seizure, showing that he had taken the boat into his custody, also that she had been replevied by Wainright and Twelves, and that they had re delivered her into his possession. He also returned the bond or stipulation, showing that they bound themselves to pay the judgment that should be rendered on the libel. Stewart George, the owner of the boat, interposed his claim, and by his answer controverted the justice of the libellant's demand; but at the August Term, 1850, of the City Court, a decree was rendered in favor of the libellant for one hundred and sixty-five $\frac{24}{100}$ dollars, besides costs of suit, and the boat was decreed to be sold according to law, and from the proceeds of sale the said sum was ordered to be paid.

On the third day of September, 1850, which was at the next term after the decree, ascertaining the amount of the libellant's demand, and ordering the boat to be sold, was rendered, the libellant, Pitman Sanders, moved the court to amend the decree that had been rendered, and to set aside the order of sale, and to render a decree upon the bond against the stipulators.

This motion was granted, and a decree *nunc pro tunc* rendered against the stipulators; to reverse which, a writ of error is prosecuted to this court.

HAMILTON for plaintiff in error:

1. The first exception is to the action of the court in compelling the party to appear to the motion, and to the court taking jurisdiction of the motion without regular notice of the same being given to the defendant. 2 Brown's Admiralty, 429; Benedict's Admiralty, 299. There is no evidence of Wainright ever having been notified at all.

Both of the defendants had good reason to consider themselves discharged, by reason of the condemnation of the boat, and the order for its sale made at the preceding term.

2. It is objected, that the court had no power to render judgment on this motion, at the September Term, after a final decree in the cause at the August term. 3 Stew. Rep. 288, 296; 3 Ala. Rep. 668. The same rule obtains in Ad-

miralty Courts. Betts Admiralty, 100; Bee's Rep. 64; 10 Wheat. 441; 7 Cranch, 1; 3 Sumner, 495, 503. The decree at the August term was a final decree. 2 Ala. Rep. 171; 5 Peters' Rep. 675; Dnnlap's Admy. Prac. 324–7; 13 Ala. Rep. 681; 6 Peters' Rep. 145; 3 Dallas, 401.

3. The motion in this case, though called a motion to amend the decree *nunc pro tunc*, is not in fact, a motion of that character; it is a motion for a new decree, and for a personal judgment, and not to modify the decree *in rem*, theretofore rendered. Under the decisions of this court, the motion should not have been sustained. 9 Porter's Rep. 252, 272, 193, 446, 163; 2 Ala. Rep. 164; 2 Stew. Rep. 470; 10 Ala. Rep. 375; 15 Ala. Rep. 202. Possibly the correct course of proceeding by the libellant, would be by libel of review. See Dunlap's Admry. pp. 324–7.

4. The judgment on the motion is erroneous. The proceedings are *in rem*. The boat had been seized by the sheriff, and had been restored to the possession of the master (Wainright;) and he again on the 7th July, before the first decree, had returned the boat to the custody of the sheriff. She was in the possession of the court at the time of the decree, and libellant had obtained an order of sale.

Bail can surrender their principal and release themselves. So in the admiralty, a stipulation is a mere substitute for the thing. Dunlap's Admiralty. Prac. 191; 12 Wheat. Rep. 10. And the stipulators having surrendered the boat to the sheriff, and he having accepted the surrender, the libellant must be content with the boat; he cannot have the thing and stipulation too. He has a perfect decree under the proceedings had at the August term, a condemnation and order of sale. He took the boat itself to satisfy his demand, and that ought to be held a waiver of the stipulation. That decree is valid and operative, and unappealed from. He cannot have two decrees. If the boat is not of value sufficient to answer all demands against it, it is his misfortune, but not the fault of the stipulators.

Jewett, for defendant:

The bond or stipulation entered into in this cause, was such as to discharge the lien on the boat, and therefore no condem-

nation and decree of sale could be awarded. Richardson v. Cleveland, 5 Porter, 251; Witherspoon v. Wallis, 2 Ala. Rep. 667; Rouse, &c. v. Jayne, 14 Ala. Rep. 731; Williamson v. Brooks, 3 Ala. Rep. 33.

The only question the stipulators can inquire into is the decree against them. Livingston v. Tallapoosa, 9 P. 111; Witherspoon v. Wallis, 2 Ala. Rep. 667; 3 Stew. & P. 223; 1 Mason, 431; 3 Dallas, 188. As to the necessity of notice to the stipulators for judgment against them. See Dunlap's Adm. Prac. 182; 1 Gallison, 148; 1 Mason, 431.

DARGAN, C. J.—I do not consider it necessary to *combat the position*, that the decree rendered at the August term of the City Court was final. But admitting it to be so, I still think the court had the power to set aside the order of sale, and render a decree against the stipulators for the amount ascertained to be due to the libellant. When the boat was replevied by Wainright and Twelves, upon their giving bond to pay the judgment or decree that should be rendered, the lien on the boat was discharged. Clay's Dig. 139; Richardson et al. v. Cleaveland & Huggins, 5 Porter, 251. The bond given by Wainright and Twelves was a substitute for the boat, and the power of the court over the vessel itself was gone. Nor could the voluntary surrender of the boat back into the possession of the sheriff, discharge the stipulators from their bond, nor revive the lien that existed upon the boat before the stipulation was given. Indeed, I see no reason why the stipulators could not, on the next day after they had re-delivered the boat to the sheriff, have again demanded her of him; for their bond stood in lieu of the boat, and the libellant had no claim upon it. If this be so, if the boat was not in the custody of the law, and if no lien existed upon it, in favor of the libellant, in consequence of the stipulation that had been given, it follows, to my mind conclusively, that the court had no authority or jurisdiction to order a sale of the boat; and if it had not, that portion of the decree that directed the boat to be sold, is void; and being so, the correct decree might well have been rendered upon the bond at the next succeeding term, without impugning the general rule, that no court can alter its final judgments after the term at which they are

rendered. Suppose, for the sake of illustration, the decree at the August term had only ascertained the amount of the libellant's demand, without ordering the boat to be sold; then it would not be denied, but that judgment might be rendered against the stipulators *nunc pro tunc* at the September term, for the record would show what judgment should have been rendered; just in the same manner, as a verdict at common law would show the judgment that should be rendered, and warrant its rendition at a term subsequent to the finding of the verdict.

Now I think the legal effect of the decree is the same, as if the order of sale had not been inserted; for what is done without authority, or jurisdiction, is a nullity, and the court had no authority to make this order; consequently the decree could well be perfected at the next term.

But it is supposed that this view is inconsistent with the decision of this court in the case of Stewart George v. Skates & Co., decided at the last term, involving this very decree. But I am not able to see the slightest incongruity between the two cases. The record in the case decided at the last term showed, that after the sheriff made his return, other creditors of the boat, whose debts created a lien on it, intervened, and sought to condemn the boat to the payment of their debts. Stewart George, the claimant, made no objection on account of the jurisdiction of the court, but simply controverted the justice of their demands. After the decree of sale was made, it further appeared that the boat had been sold, and the proceeds of the sale were in the hands of the sheriff for distribution. Then, but not until then, did the claimant raise the objection to the jurisdiction, and this was done on a motion to have the money paid to him.

Under these facts we held, that it could not be said that the court was without jurisdiction, inasmuch as it had the actual possession of the boat, had ordered its sale, and had the money arising from the sale under its control. But it must be borne in mind, that the debts of the intervenors created a lien on the boat, and on the fund in court, which was produced by its sale. The only remaining duty left for the court in that case was to distribute the fund, and surely it did right in ordering its payment to those who were first entitled. But the record

before us shows no sale, nor any debt which constitutes a lien on the boat; but simply shows a decree ascertaining the amount of the libellant's demand, and the order of sale. This order of sale may be treated as a nullity, for the record shows no debt or demand that can be enforced as a lien upon the boat; and as it might be so treated, there can be no error in rendering the decree *nunc pro tunc* against the stipulators.

Let the judgment be affirmed.

HARRINGTON *vs.* MERIWEATHER.

1. On the trial of an action of assumpsit, a bill of exceptions was taken by the plaintiff to the rulings of the court, and the jury also rendered a verdict in his favor. On motion of the defendant, a new trial was granted, "with the understanding that the same be revised, and a bill of exceptions allowed." The plaintiff filed a transcript of the record in the Supreme Court, without suing out a writ of error, and assigned for error the bill of exceptions. *It was held*, That the cause should be stricken from the docket, there being no final judgment, and no writ of error.

Tried before the Hon. Alex. McKinstry, Judge of the City Court of Mobile.

DARGAN, C. J.—Noah Harrington brought an action of assumpsit against Meriweather in the City Court of Mobile. Upon the trial, a bill of exceptions was taken to the ruling of the court by the plaintiff, but the jury rendered a verdict in his favor. The defendant moved for a new trial, which was granted by the court, "with the understanding," as the record informs us, "that the same be revised, and a bill of exceptions allowed." No writ of error has been issued, but the plaintiff Harrington assigns for error the bill of exceptions taken upon the trial.

It is enough to say, that there is no final judgment in the cause. The grant of the new trial sets aside the verdict and judgment that had been rendered, and the cause stands in the court below as if no trial had ever been had. No writ of error therefore can be sued out to this court, for it lies only upon a final judgment or decree.

But in this case there is no writ of error, and it seems to be the desire of the parties, to obtain the opinion of this court upon a question of law, which may come up upon the trial that may hereafter be had. We only possess the power to revise the action of the court, when the judgment is final; until then, there is nothing to revise.

Let the cause be stricken from the docket.

REPORTS

OF

CASES ARGUED AND DETERMINED

AT JUNE TERM, 1852.

CHASTANG'S HEIRS *vs.* ARMSTRONG.

1. A title to land situated within the Territory of Louisiana, which was confirmed under the third section of the act of Congress of May 8, 1822, derives its validity and vitality from the act itself, and not from the subsequent location and survey, which the Register and Receiver was authorized to make under the fifth section of the act.
2. Such a title is a legal title, and is sufficient to maintain an action of ejectment.
3. The act of Congress vests the title in those who are alleged to be the claimants in the application to the Commissioner, and according to their interest as therein propounded.
4. Where a claimant, as executor of his father's will, made application to the Commissioner, "on behalf of himself and the other legatees" therein named, praying that he might be confirmed in his claim, and the Commissioner having reported favorably to the claim, the same was afterwards confirmed by the act of Congress, the title vests in all the devisees of the testator, and they may maintain ejectment.
5. Where two different claims to the same tract of land are confirmed by the same act of Congress, the title of the Government can pass but to one of the confirmees; and if it be admitted that one has a perfect title, it follows that the other can have none at all.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. John Bragg.

This was an action of ejectment brought by Chastang's Heirs against the defendant in error, to recover a certain lot situated in the city of Mobile. The case is a branch of Doe

ex dem. Chastang v. Dill, reported in 19 Ala. Rep. 42. For a full statement of the facts reference can be had to that case. The titles, under which the parties respectively claimed, are also stated at length in the opinion of the court.

JOHN A. CAMPBELL, for plaintiff in error.

In 1814, Basil Chastang, testamentary executor of John, on behalf of himself and the other legatees of his father's will, presents his title under the act of 1812, to Commissioner Crawford. He bounds his lot definitely by public monuments (streets and distances thereon.) It can be precisely ascertained. He rests his claim on the fact that the land has been occupied for thirty-two years, and that the title deed has probably been lost by time or accident. The will of his father is appended to the petition.

The commissioner reported in favor of the claim, and it was confirmed under the third section of the act of Congress, of 8th May, 1822, relative to claims in Mobile. The lessors of the plaintiff claim under the title of their father, confirmed to his legatees by this will.

Two objections are raised upon this claim. 1st. The defendants say no right is represented, except that of Basil Chastang. He is a trustee for the legatees. The claim is made as a representative—the will of John Chastang is presented, and the rights of the legatees presented. Suppose a title had been drawn, what would have been its form? Whereas, Basil Chastang, on behalf of himself and the other legatees of his father under the following will, asks the confirmation of their rights under the same, now we do hereby ratify and confirm the same.

We know that the patent from the Land Office would have been in favor of the "legal representatives of John Chastang." Such are the instructions found in the published decisions of the Government. 1 Instructions and Opinions, 48–741–752.

The Government creates no trusts. It confirms upon the claim presented, and confers title according to the claim and evidence. It requires the production of the mesne conveyances for the very purpose.

Basil Chastang makes no claim for himself alone. He presents the claims of others, as well as his own, and declares

his agency. These notices are not to be nicely and technically construed, but to be construed so as to carry out the policy of the Government and the intentions of the claimant. The intention of Basil Chastang was, simply to ask the Govevernment to confirm the title enjoyed under the will of his father to the objects of his bounty.

This purpose is definitely expressed. The object of the Government is to confirm to those who have the pre-existing rights. These are disclosed in Basil Chastang's notice, and he says he acts for the persons who hold those rights. It follows, therefore, that the confirmative act will be distributed so as to fortify the inchoate titles of each of the legatees, as they are shown by the will.

The act of 1812 (4th section) provides, "that every person claiming lands" in the district west of the Perdido and east of the island of New Orleans, under any grant, order of survey, or other evidence of claim, should deliver to the commissioner of claims a notice in writing, *stating the nature and extent of his claims*, together with a plat (in case a survey shall have been made,) of the tract or tracts claimed; and shall deliver every grant, order of survey, deed, conveyance, or other evidence of his claim, to be recorded, &c. 1 Land Laws, 606.

The commissioner was required to inquire into whatever might effect the justice of the claim. He was required to make abstracts of the claims and of the evidence, and to report to the Secretary of the Treasury, that they might be submitted to Congress.

This duty was performed in regard to this claim. The notice set forth the exact limits of the lot; that it had been occupied for many years, and that the original grant had been lost. Congress, by act of the 8th May, (3d section,) employs this language: "That all claims reported, founded on private conveyances which had passed through the office of the commandant or other evidence, but founded, as the parties allege, on grants lost by time or accident, recommended for confirmation, shall be confirmed in the same manner as if the titles were in existence: *Provided*, That when the quantity claimed is not ascertained, no claim shall be confirmed for more than 7,200 feet."

What is meant by the words "claim" and "as if the titles

were in existence?" The word claim does not refer to the statement in the abstract. That is not the claim of the party, but merely a description of the claim he had preferred. The claims referred to are obviously those contained in the notice, and supported by the evidence, which have been embraced in the report of the commissioner. The government confirmation operates upon the claim as it has been exhibited in the notice, and supported by the evidence accompanying it.

When the notice and evidence ascertain the quantity, the claim is fully ratified. When it does not, only 7,200 feet are allowed. The precise effect given to the confirmation is expressed. It is, to establish the claim as if the titles were in existence. It will be seen that the claim of Basil Chastang meets every requisition of the act. The allegations of the notice show that the grant has been lost; that thirty-two years of occupation has existed; and that the quantity is definite. The claim, then, is confirmed as if the titles were in existence. The question arises, what titles? The answer must be, those described in the notice, and whose existence was made probable by the evidence.

It is supposed that the title does not become complete till the survey and location are perfected. The 5th section empowers the Register and Receiver to direct the location and survey. And when there are conflicts, the authority is given to the same officers to decide them according to the one or the other of two rules: 1st. To respect the lines agreed on between parties; but if there have been none such, then to divide the land, unless one had trespassed on the claim of the other.

No other mode of proceeding in the case of conflicting locations is to be found in the act. 1 Land Laws, 824, § 4.

The question then plainly arises, whether the title of the plaintiff is dependent upon the location and survey, or whether the act was sufficient. In the argument in Dill's case, a patent was declared to be necessary, and the same argument was submitted to the Supreme Court of the United States in the case of Farmer's Heirs v. Eslava. The court in that case decided between confirmed titles; one of which had been prosecuted to the issuing of a patent, and the other had only been surveyed and certified. The court say, "*that the*

patent gives no title to the patentee superior to what a confirmation had given." The court recognizes the importance of the pre-existing right under the Spanish government. It says: "A certificate of confirmation, such as Eslava had, is very different from a certificate of purchase, *as the former shows that the legal title has already passed*, while the latter is merely evidence that it ought to be passed. A patent is necessary to complete the legal title in the *last case*, but *not in the first.*" 9 Howard, 446–447.

The court in this case shows no countenance to the doctrine of the necessity of a patent survey or location. In that case the Land Office had overruled Eslava's right, and upon that opinion had excluded Eslava, but the court held that the conflicting rights were not in the cognizance of the officers of the Land Office. 9 Howard, 449.

The whole argument in this decision indicates strongly that the court considers the title as complete by the act of Congress, and that the proceedings subsequent between adverse claimants do not conclude as to title.

The question came up in the case of Stoddard v. Chambers. It will be found stated in the argument of counsel. 2 Howard, 307, 3d point. The facts of the title will be found stated in the argument of Ewing, 307. The court say, in that case: "A confirmation by act of Congress vests in the confirmee the right of the United States, and a patent if issued could only be evidence of this." No stress is laid upon the fact that there had been no official survey.

In Chouteau v. Eckhart, the Supreme Court says: "The plaintiff's title is *prima facie* a good legal title, and will support an ejectment, on the act of 1836, *standing alone*, if the land can be identified, as confirmed, without resort to the patent." This court held in Strother v. Lucas, 12 Peters, 454, "that a grant may be made by a law, as well as a patent pursuant to a law, is undoubted, and a confirmation by a law is as fully, to all intents and purposes, a grant, as if it contained in terms a grant *de novo*." 2 How. 372–3.

The language of the act of 4th July, 1836, provides that the decisions of the recorder of land titles in favor of land claimants, under a particular act, as entered in the transcript of decisions transmitted to the General Land Office, and which had been laid before Congress, be confirmed.

The principle of these decisions is carried to their full extent in the case of Ladiga v. Roland. It was held, that a right to a reserve conferred by a treaty with the Creek tribe of Indians did not stand in need of location to perfect the right of the reservee, although the treaty provided for the locations and selections. 2 Howard, 581.

The efficiency of laws in conferring legal rights against patents or other evidences afforded by the executive departments of the government, will be further shown by the cases reported. 9 Howard, 314, 333.

The decisions in our own court upon this subject, are equally to the point. The remarks of Judge Ormond, in the 7 Ala. Rep. 556, are pertinent and well considered, and seem to have been written in an exact conception of the character of these titles.

It being then apparent that the acknowledgment of the claim of the plaintiffs by the government as legitimately founded, and its declaration that it should be confirmed as if the titles were in existence, brings us to the consideration of the second branch of the statute.

What is the effect of the confirmation on the location of the lot?

The provision of the act of 1822 is, that in all such claims, where the quantity claimed is not ascertained, no one claim shall be confirmed for more than 7,200 feet.

Where, then, do you look for the ascertainment of the quantity? You look to the notice of the claim, to the evidence upon it. These are required to show the quantity, and to identify the claim for the inquiries of the government.

The powers given to the commissioner by the 5th section of the act of 25th April, 1812, for examination are plenary. He is authorized to ascertain "every other matter respecting said claims which may effect the justice or validity thereof."

When, therefore, the claim is ascertained in the notice and record of the commissioner, the confirmation operates upon it as there exhibited. The officers of the Land Office have no option in regard to the survey and location, except to follow the title confirmed.

The case of Mackay v. Dillon, 4 Howard, 421, arose under the act of 13th June, 1812, relative to Missouri. The act

does not operate upon a report or evidence, but upon the rights, titles and claims of portions of lots possessed, cultivated or inhabited prior to the 20th December, 1803; the confirmation is according to their respective rights.

This quality of the act is directly referred to by Justice Catron in his opinion. 4 Howard, 446. The court in this case, for the reason that no survey or evidence was adopted by the act, held, that an instruction holding a private survey to be conclusive was wrong. But in the case following, even under this act, which in no manner refers to a claim as made to the Land Office, or to the evidence adduced in its support, the court held that the land could be identified by a private survey. Judge Catron, on page 462 of the case, refers to this point. He says: "The second instruction given by the Circuit Court was, that the notice of claim filed with the Recorder and exhibited to the board, was evidence of the extent of said claim to commons. The competency of the evidence was not objected to on part of the plaintiff. It was such as she herself resorted to for the establishment of the extent and boundary of her own claim, and aside from the legal and official survey of the commons made in 1832, is the only evidence of boundary that is likely to exist at no future distant day, and was the usual evidence introduced to prove the fact bebefore the survey of 1832 was made. The court gave no opinion on its effect, but properly left it to the jury. The language of the instruction thus approved is as follows: "That the notice of claim of said inhabitants as filed with the recorder of land titles, and exhibited before the board of commissioners, read here to the jury, is evidence of extent of solid claim to said commons." 4 Howard, 455.

The case of Bissell v. Penrose, which proceeds entirely on the effect of an act of Congress upon the evidence submitted, will be found to maintain the view that we are now presenting to the court. That when the quantity is ascertained by the claim and the evidence adduced to support it, the confirmation operates at once to vest the entire estate in the confirmee. In this case the court say: "The case before us depends upon the construction of our acts of Congress disembarrassed from any inquiries into the origin of the grants, or into the rights and principles upon which they

were founded, or which made it the duty of the government under the treaty to acknowledge them. Inquiries of this kind were closed on the confirmation of the grants by the act of 1836. The title then became complete. It became an American, not a Spanish, title." The court then proceeded to declare that a private survey identified the land, preserved it from other claims, and that the act of Congress ratifying the claim entitled the confirmee to it according to the survey.

We then find from these cases that they are regulated by the phraseology of the acts of Congress, and determinable in some manner, by the circumstances of the case. We have found that the powers given to the land officers do not effect contradictory rights, but simply as to disputed boundaries.

The register of locations is nothing, *till acted on.* We did not accept of the location, nor is it in evidence.

In this case the question is stripped somewhat of its difficulty by the aspects of the defendant's title.

The defendant comes in as a donation claimant. He presents no title to the justice of the government; no obligation to bind its conscience. The United States has continually recognized its duties to the inhabitants transferred to them, and that the perfection of inchoate or imperfect titles was a matter of conscientious obligation. This principle runs through a large series of acts of Congress, and it is declared and expounded in the decision reported in 12 Peters, pp. 435–6–7–8.

The United States then, in recognizing the title or "claim" of Chastang as founded on a Spanish grant, having definite dimensions, created an estoppel against itself and all persons claiming through it. The acknowledgment applies as well to the extent as to the validity of the claim. The United States could not have intended to open a litigation between itself or those claiming from it, and the ancient inhabitants, or to arm by donations or sales its own citizens with means of vexation to them. "They had in object to ascertain what belonged to the United States, so that sales could be safely made, the country settled in peace, and dormant titles not be permitted *either to disturb ancient possessions;* to give to their holders the valuable improvements made by purchasers, or the sites of cities, which had been built by their enterprize." 12 Peters, 448.

The great object was to settle by act of Congress the title upon an American basis, after previous examination. The estoppel, then, created by the action of the government, is complete against the defendant's donation title.

The charge of the court below assumes the superiority of our paper title.

The point of difficulty lies in its interpretation of boundary.

We say that the acknowledgements of Congress are, 1st, That there was a grant; 2d, That it covered a particular and ascertained lot; 3d, That John Chastang was the grantee; 4th, That the title had been devised according to the will exhibited with the petition.

We say that this acknowledgment of the political department of the government operated as an *estoppel* upon it and the *donation* claimants, under the 4th section of the act, and the persons who might derive title from them. to deny these facts.

If a government survey would be conclusive of boundaries, would not this acknowledgment of limits be quite as authoritative as a survey—not between another Spanish claimant and Chastang—but between the United States and him who is to receive their grant as a donation?

The Supreme Court of this state has once declared, and Judge Ormond has dropped the dictum, that the interest of the donee did not vest till the grant. 16 Ala. Rep. 239.

The donation is prospective, while the confirmation operates on an existing claim and validates it. 2 Howard; 8 Howard S. C. Rep. 313; 7 Ala. 556.

An acknowledgment of the same facts, *under seal*, viz: the existence and loss of a grant, lost by time, or possession for thirty-two years of possession under title, with a confirmation as if the titles were in existence; would constitute such evidence as would support an ejectment. How much more is this the case when these acknowledgments are found in an act of Congress.

The defendants in error contend that the lessors of the plaintiff below do not connect themselves with the title of John Chastang. The will of John Chastang is a part of Basil Chastang's application, and is made the foundation of the

claim. Congress has affirmed the validity of that will and the capacity of the parties to take under it. It is as if the United States had taken the names and estate of the devisees and noted them in the act. The recitals created an estoppel against the United States and all parties claiming under the United States. 12 Peters, 454–458. The title is an American grant, and the evidence submitted loses its value after the United States has adopted and acted on it. The evidence operated as an inducement to the government to act, but the act is valid not in consequence of the sufficiency of the inducement, but the fullness of the power of the United States. The act of Congress "merges all previous requirements and all further inquiries into such requirements when the grant is relied on," &c. 9 Howard S. C. Rep. 155–371.

The question now comes as to the statute of limitations. Louison received the lot from Dr. Chastang's devise. He had been in possession for upwards of thirty years, the longest period of prescription under the Spanish law. This possession was held under a legitimate government, from 1780 to 1800; and under the *de facto* governments after. The title was one protected by the Louisiana treaty. The United States never sought to divest these rights, but to establish them as they were held under the laws and usages of the former governments.

Louison had a life estate. No person ever trespassed on the possession of Chastang. No adverse right was ever pretended against him. The first interruption was after his death. The statute of limitations might run against her life estate, but not against those who hold in remainder. 4 John. Rep. 390; 5 Cowen, 103; 3 B. & C. 757; Tillinghast Adams, 57. The defendant in error insists that the legal title was in Basil *for the use* of the legatees. The United States cannot be supposed to create such estates, and if they did, the statute of uses of Alabama, in this case, would execute the use.

What rights were placed before the government? They were those derived from John Chastang. What considerations were addressed to the government to induce a confirmation? They were the grant made to Chastang, which had been lost, and his long continued occupation, affording evi-

dence of it. What evidence of title was shown to connect the claimants with the land? It was the will of John Chastang. On whose behalf was the claim presented? It was on behalf of the legatees under the will. How would the patent have issued under the Land Office regulations? To the legal representatives of Chastang. Instructions before cited.

The defendants in error, finally, place themselves upon an outstanding title of Baudain, and say this is superior to ours. It is shown that Baudain never, for one hour, had any possession of the land. Plumbly, without right or claim, entered in the fall of 1813, to the east of or into the enclosed lot of Chastang.

No antecedent fact to support this title of Baudain is presented. It has the support of a government confirmation, but the patent is issued with this significant saving, "subject to any just claim or claims *to all and every part thereof*, of all and *every* person or persons, bodies politic or corporate, derived from the United States, or from the British, French, or Spanish authorities. To have and to hold the same, subject to any just claim as aforesaid, so that the United States and no one claiming by, through, or under them, shall set up any claim thereto." Then there is obviously upon the face of the patent itself, a refutation of the doctrine that the Baudain claim has been established at our expense. The government has confirmed both tracts, and has provided, in a limited number of cases, for the settlement of the conflicting boundaries. In this case there is and could have been no adjudication between the rights, nor were the officers of the Land Office clothed with the powers to adjudicate such rights.

The Baudain title, however, has no connection with the defendant's possession. It is outstanding. To be available it must be operative, subsisting, such as will sustain an ejectment. This has been tried with the Baudain title and failed.

The title must be so available that the defendant could not resist it. 3 Wash. C. C. 498; 3 John. 375; 4 Dana, 561; 4 John. 202; 9 Yerger, 325; 6 John. 257. The title in a stranger is a shield to the defendant. He is permitted to

avail himself of it, but it is *stricti juris*, and must be clearly established. 6 Peters, 302–312.

PHILLIPS, *contra:*

Basil Chastang made application in May, 1813, for a confirmation.

He exhibited no title whatever, but expressed a belief that his father once had one.

In the case of Dill, decided at last term upon the same title, the court decided that the Chastangs had no title, except such as they derived from the act of 1822.

The will of John Chastang, executed in 1805, was filed, not for the purpose of asking the government of the United States to examine into its provisions, to approve or disapprove of its limitations, or in any manner to take cognisance of its trusts or its conditions, but simply to show the Land Officers the warrant or letter of attorney, by which Basil Chastang considered himself as justified in presenting himself as the claimant.

He states in his application, that he acts for "himself and the other legatees therein named," and the prayer of the petition is, that as "executor aforesaid, *he* may be confirmed in his claim to said lot."

The 5th section of the act of 1812 defines the duty of the commissioners, to the investigation of the validity of the claim. U. S. Stat. 2 vol. 715.

The character of the will, therefore, was a matter of no sort of consequence to the government, nor can it be supposed in making a grant, to have any reference to its provisions.

Whether the limitations of the will were such as would be supported in the State Courts or not, are inquiries which the government never intended to make, but they pass the title to the individual reported to Congress as the claimant, and leave questions as to the rights of property between parties to be settled by the State tribunal.

The opposite view is, that Congress, in legalizing the claim, approves also the titles or authority under which the claimant appears, and in this case, not only made a grant of title in 1822, but made it to take effect as provided for by the will of 1805.

Suppose the will to be opposed to the laws of the State.

Suppose it invalid to pass an estate, in not complying with legal requisitions as it is in this very case, is the act of Congress to give it validity, and thus override State authority?

The claimant does not ask that a grant may be made, to conform to the provisions of the will; but that as executor, he may be confirmed in his claim. Having obtained the confirmation, the laws of the State would have compelled him, if the will was valid, to permit the property to be enjoyed as it directed.

The case stands in the same position, as if Basil had made an application in right of his father, or as executor of his father, without filing the copy of the will. In either case the title flows from the government upon the actor in the land office, the claimant, and the rights which lie behind this are settled by the State tribunals.

It is the claimant, and not the party really in interest, who takes the title. Strother v. Lucas, 6 Pet. 763; Same case, 12 Pet. 458; Stoddard v. Chambers, 2 Howard 316; Russell v. Penrose, 8 Howard 338; La Roche v. Jones, 9 Howard 170.

Not only was the report in favor of Basil as claimant, but the patent certificate issued in his name, and upon this certificate if a patent had ever issued, it would have conformed to the certificate.

Under this act and patent certificate, can it be denied, that Basil could have maintained his action of ejectment against a stranger? Could he have been defeated by showing an outstanding life estate in Louison, or after her death, by proving there were other heirs entitled?

It seems to me, as against all the world he held the legal title, and as against those who were interested under the will, he held the title subject to their equities.

In the case of Hall v. Root, 19 Ala. Rep., the claim was made by Thos. Dunn, in right of his father Cornelius Dunn. Before the claim was acted on, Thomas died. The claim was revived by Thomas Byrne, the son-in-law, and he conveyed to Root; the point was made that the confirmation was in law to the heirs of Dunn, but the Court overruled the objection, and held the legal title to been vested by the confirmation in Byrne.

Suppose the government had issued a patent reciting that Basil had made an application on behalf of himself and the other legatees, and in consideration thereof, had vested the legal title in said Basil, to be held for his use as well as for the use of his co-legatees, would not Basil have been invested with a legal title to have enabled him to maintain ejectment?

The legal title passed by the act, but with the condition annexed that it might be located by the Register and Receiver under 5th sec. of act of 1822, and the State Court can exercise no jurisdiction upon the location so determined.

The letter of the commissioner, July, 1824, in reference to the city map of Mobile, stating that he had determined not to issue any more patents until "the land officers shall have decided upon interfering or conflicting claims." 2 Vol. Instructions and Opinions 841; See also 741.

The title outstanding in Baudain was a complete defence, as it showed a superior title to the plaintiffs, although it might be barred as against defendant; an outstanding title is said to be one which would afford a recovery against either of the contending parties. Hall v. Gittinge, 2 Har. & John. 125.

In the case of Foster v. Joyce, 3 Wash. 501, the court say the title outstanding must be a subsisting available title, "on which the asserted owner might recover if he were the lessor of plaintiff.

So in 4 Wash. 171, it is stated that the outstanding title must be better than plaintiff's.

A title under statute in a third person, which would bar the plaintiff, if such third person were defendant, will defeat his recovery against any other person. 1 Nott & McCord 307.

Elder patent tolled in behalf of the defendant's possession. 4 B. Monroe 387.

The defendant may have no right to the property, but it is equally clear the plaintiff has no right to recover, because he has no title. 6 Mis. 335.

The right of entry destroyed by adverse possession inures to the benefit of possessor. Chiles v. Clark, 1 A. K. Mar. 582; Chiles v. Jones, 4 Dana 482; Colston v. McVay, 1 A. K. Mar. 251.

Presumptions are sometimes indulged in favor of the possession, but not against it. Adair v. Lott, 3 Hill, 186.

Basil having been invested with the legal title by the act of 1822, was subject, from that time, to the operation of the statute of limitations, which on barring him, would also bar his *cestui que* trust. Lewen on Trusts, 24 Law Lib. 307; 3 Pierre Williams 310.

DARGAN, C. J.—The plaintiffs rely upon the same title on which they did in the case of the Heirs of Chastang v. Dill, decided at the last term, but they did not introduce all the written evidence of title offered in that case. In this, they have omitted the certificate of confirmation and the warrant of survey issued by the Register and Receiver of the Land Office at St. Stephens, and consequently, they rely upon the application of Basil Chastang, made to the commissioner in behalf of himself and the other devisees under the will of John Chastang, the will of John Chastang, deceased, the report of the commissioner to the Secretary of the Treasury recommending the confirmation of the claim, and the subsequent act of Congress, passed the 8th of May, 1822, by which the claim was confirmed. The defendant again insists, that the plaintiffs have failed to show such a legal title as will sustain the action of ejectment. We, however, think it is the act of Congress that gives the title, and not the subsequent location and survey which the Register and Receiver was authorized to make under the fifth section of that act. The plaintiff's claim is of that class which is confirmed by the third section of the act; that is, a claim that had passed through the office of the commandant, and founded, as the claimant supposed, on a grant that was lost. The third section of the act, referring to such claims, declares, that they "*shall be confirmed in the same manner as if the titles were in existence.*" Now I take it, that the true meaning of the word "confirmed," as here used, is to make make good, *or establish;* the claim, therefore, which before the act was invalid, is thereby made good and valid. The question might be asked, from what time did Congress conceive that the validity of the claim would date? The answer would be, from the time of the passage of the act. It was this that gave validity to the

claim; and I see nothing in the act from which it can be inferred, that its validity was intended to be deferred or postponed, until a subsequent period; and if it was the intention of Congress, to make the claim valid from the date of the act as against the government, it was at that period of time that the plaintiffs received a title, the character of which is precisely the same, as if the original grant (supposing one to have been obtained by the applicant, which had been lost,) had been in existence. Consequently, the title thus derived under the act of 1822 is a legal title as contra-distinguished from an equitable title. This view I think in accordance with several decisions of the Supreme Court of the United States.

In the case of Farmer's Heirs v. Eslava, 9 How. 421, the plaintiff's title consisted of a claim founded on a French grant to Groudel, bearing date in 1757. Groudel conveyed to Guichandene, who sold to Count Pascher, who, by deed alleged to be lost, conveyed to Robert Farmer. This claim was presented to the commissioners by the heirs of Farmer, who, by their report, recommended its confirmation, and the plaintiffs insisted that it was confirmed by the act of 1822. The plaintiffs also showed, that a certificate of confirmation had been issued by the Register and Receiver of the Land Office, and the claim located and surveyed, after which a patent regularly issued to the plaintiffs, professing to convey such title as the government then had in the premises, subject however to all just claims derived from the government of the United States, or from the Spanish, French or British authorities.

The title of Eslava consisted of a Spanish concession, dated in 1788, granted to Elizabeth Fonnerette, who conveyed it to Fontennella, who sold to Orsona, and Orsona conveyed to Eslava. The claim of Eslava had been presented to the commissioner, who reported it as one that had passed through the office of the commandant, and recommended its confirmation. This claim was confirmed by the third section of the act of 1822, as one founded on a grant that had been lost. He also showed a certificate of confirmation issued by the Register and Receiver, and further, that the claim had been located and surveyed, but no patent had been issued to him; nor did it appear that he had ever applied for one. The Su-

preme Court, confining its decision exclusively to the titles derived from the United States, said, "Both claims were confirmed by Congress at the same time; the former then is no better than the latter." This language, as well as the entire opinion delivered in the case, shows that the Supreme Court considered that it was the act of Congress of 1822 that gave the title, and not the subsequent location and survey, or patent issued thereon; and as the claims of both parties to the same lot were confirmed by the same act, the one could not, by virtue of the title thus derived, claim superiority over the other; for both titles dated from the same period of time, and both were derived from the same authority. This decision is sustained by the cases of Stoddard v. Chambers, 2 Howard, 307, and Chouteau v. Eckart, ib. 344. Indeed it cannot be doubted, but that a title may as well pass by an act of Congress, as by an act of a ministerial officer of the government; and when a claim is presented to Congress and is confirmed, its validity as against the government must date from that period. And if there is nothing in the act itself that would show that the title did not then pass to the claimant or confirmee, we should hold that the title thus derived was a legal one, which would sustain the action of ejectment, if the particular land, the title to which was confirmed, could be identified or ascertained by proof *aliunde.* See Ladiga v. Roland, 2 How. 581.

Nor does this construction conflict with the fifth section of the act, which gives to the Register and Receiver authority to direct the manner in which the claims to land thereby confirmed should be located and surveyed, and also to decide between the parties in all cases of conflicting claims. These locations and surveys were not only necessary to give the claimants convenient evidence of title, but when the claim did not show the quantity of land claimed, nor the boundaries by which the quantity could be ascertained and the particular land identified, they became indispensable, in order to fix the title to the precise land granted by the confirmation. But when the claim shows the quantity, and the identity of the land can be ascertained, then the location and survey are not indispensable, for it is the act of Congress, and not the subsequent location, that gives the title. We therefore must hold, (applying this test to the plaintiff's claim,) that the title

derived under the act of the 8th of May, 1822, is a legal one on which an action of ejectment may be brought.

But it is again insisted, on the part of Armstrong, that the title derived under the act of Congress vested in Basil Chastang, and not in the devisees of John Chastang, according to the provisions of his will.

It is true that the legal title, by these acts of confirmation, vests in the claimants, for it is in their favor the act was passed, and the legal title passing from the government by the act, it can vest only in the person who was designed to take. Independent of all authority, this seems to be self-evident; but the question is well settled upon authority, Bissell v. Penrose, 8 How. 317; Laroche v. Jones, 9 How. 170; Strother v. Lucas, 6 Peters, 763; 12 Peters, 458; 2 How. 316. This proposition, however, does not solve the question. The inquiry still is, who is the claimant in the case before us? To answer this inquiry, we must ascertain what constitutes the claim, and by whom or in whose favor was it presented; then, applying the act of confirmation to the claim thus presented, we shall be able to discover in whom the legal title is vested. The claim, as I understand it, is the right, title or interest, propounded by the applicant to the Commissioner, in reference to which he was required or authorized to take evidence, and report his opinion thereon to the Secretary of the Treasury. His report upon the claim cannot be said to be the claim itself, but rather his opinion or conclusion in reference *to it*. The claim, then, consisting of the right or title presented to the Commissioner, it follows, that the claimants are those who are alleged in the application to him to have that right or title, and the act of Congress confirming the claim vests the title in the claimants, according to their interest as propounded to the Commissioner. I, therefore, feel satisfied that the title granted by the act of 1822, upon the application of Basil Chastang, vested not only in him, but in all the devisees of John Chastang, deceased, according to the provisions of his will; for the application or claim was not presented by Basil Chastang for himself alone, but also in behalf of all the other devisees under the will of his father; they, therefore, were all claimants, though their claim was presented by Basil Chastang alone, and the act inured to the

benefit of all. We come, therefore, to the conclusion that the plaintiffs have shown a legal title, on which an action of ejectment may be sustained, and in order to defeat recovery, the defendant must show a better, or at least an equal title, either in himself, or outstanding in another; and this leads us to consider the evidence of title offered by the defendant.

To show title in himself, the defendant proved that the lot in controversy was occupied by one Plumley in 1813, who had taken a lease for it from one Pollard, but Plumley disclaimed the tenancy, and asserted title in himself. In 1814 Plumley sold the lot to Schaffer, who entered into possession and commenced erecting a building, but died shortly afterwards. Carman Frasee intermarried with the widow of Schaffer, and completed the house. After the death of Mrs. Frasee, her son and heir at law sold the lot to one Raizor, who also died, and the lot was again sold by order of the County Court of Tuskaloosa, and was purchased by Daniel Dill, who sold it to the defendant. The defendant also read in evidence the application of Carman Frasee for the lot, made to the Commissioner, his report thereon to the Secretary of the Treasury, and also the act of Congress of 1822, and insisted that it was confirmed thereby. But the record does not disclose the character of this claim, nor the report of the Commissioner made thereon; we, therefore, cannot judge of its validity as a title, and will dismiss its consideration without further remark. The defendant also read in evidence a Spanish concession, granted to Henry Baudain, bearing date in 1798. This claim of Baudain had been presented to the Commissioner, who made a favorable report thereon, recommending its confirmation, and then read the same act of Congress showing that it had been confirmed. The defendant then proved that the Register and Receiver had, under the authority of the fifth section of the act, located and surveyed this claim in the year 1823, whereupon a patent was issued to Baudain in the year 1837. It was also proved that the *locus in quo* was within the claim of Baudain, and was covered by the patent. But it was shown that the claimants under the patent of Baudain had brought an action of ejectment in 1838, against the then tenant in possession, but had been defeated on the ground that the tenant, and those through whom he

claimed, had had the adverse possession of the lot for more than twenty years. Upon this evidence, the court instructed the jury that the defendant could not set up the title of Baudain, though *perfect* within itself, because it was not a subsisting title against the defendant, being barred as to him by the statute of limitations.

We all agree that this charge was erroneous. We have seen that the plaintiff's title, as well as the title of Baudain, is derived from the same source, to wit: the government of the United States. They both commence at the same point of time, and from the same authority; and if it be true that the title of Baudain is perfect within itself to the *locus in quo*, it would follow as a necessary sequence, that the plaintiffs have no title to the lot sued for. They derive title under the act of 1822, and of course can take only such title as that act gives them. Baudain derives title under the same act, and if he acquired the title to this lot, then the plaintiffs could not; for the Federal Government had but one title, and if this was imparted by the act to Baudain, it could not be given to another. By showing, therefore, a perfect title in Baudain, the defendant showed an absence of all title in the plaintiffs.

But no question was made in the court below upon the comparative merits of the two titles. The court assumed that the title of Baudain was perfect, and we, therefore, have examined this case upon this assumption, without intending to say which title, that of the plaintiffs or that of Baudain, is superior; or rather, as between them, who has the title to the lot in controversy. That question can only be properly decided, when it is made the point in the court below on which the case turns; but, as the case now stands, the court below thought it unnecessary to decide between the two titles, and we think it improper for us to do so.

This view renders it unnecessary to decide the question touching the statute of limitations; for if the title of Baudain should be found the better, it will prove that the plaintiffs have none, and if the title of the plaintiffs be superior to that of Baudain, still no question touching the statute of limitations can arise, for the defendants will then fail to show a superior outstanding title.

Let the judgment be reversed, and the cause remanded.

HARRISON & SAUNDERS *vs.* HARRISON.

1. Husband and wife constitute in legal contemplation but one person, and cannot therefore, be domiciled in different States, so long as the relation remains unimpaired, upon which their legal identity depends.
2. Where the parties married in South Carolina, and there resided for several years, and afterwards removed to this State, where the husband permanently settled, the wife's *legal* domicil is in this State, notwithstanding she has been forced, by her husband's cruel treatment, to abandon him, and seek the protection of her friends in South Carolina.
3. No other State has jurisdiction to annul, or materially to impair the marriage relation between citizens of this State: and having no jurisdiction of the subject matter, consent of parties cannot confer it.
4. Where the marriage was celebrated in South Carolina, and the husband, by his cruel treatment of his wife while domiciled in that State, compelled her to abandon him and return to her parents, and afterwards, by promises of amendment, persuaded her to return to him, which promises he never fulfilled, but removed with her to this State, and by his renewed misconduct and ill-treatment again compelled her to abandon him and seek the protection of her friends and relatives in South Carolina, where she subsequently filed a bill in equity to compel him to make provision for herself and her infant child, and to enjoin him from molesting her. *It was held:*
   1. That the decree of the Chancery Court in South Carolina, in accordance with the prayer of the bill, was but enforcing the duties and obligations of the marriage relation, and did not annul or materially impair it.
   2. That the condonation, on the part of the wife, of her husband's past transgressions, was rendered inoperative by his subsequent ill-treatment, and that she became thereby remitted to her original remedy against him.
   3. That the removal of the parties to this State did not deprive the wife of her remedy for past transgressions in the State of South Carolina.
   4. That the wife's actual residence in South Carolina entitled her to the remedies afforded by the courts of that State, for her personal security, and to the provisions usually made by those courts for maintenance consequent upon the husband's ill-treatment while domiciled within their jurisdiction, *provided*, the court could acquire jurisdiction over the husband.
   5. That the husband, by answering the bill without objecting to the jurisdiction of the court, will be held to have waived his right to make the objection, and to have conceded to the court the right to proceed.
5. A decree for maintenance to the wife, rendered by the Court of Chancery in South Carolina, where no divorce is by law allowed, to continue until the reconciliation of the parties or the death of either one of them, cannot be enforced in this State against the husband who has subsequently obtained a valid decree of divorce in the courts of this State, *except* for the amount due upon the decree at the time the decree of divorce became effectual. But as to this amount, the subsequent decree of divorce is no estoppel, although the main allegations of the bill upon which the divorce is founded are in conflict with the allegations contained in the wife's bill for maintenance.

6. In a suit upon a judgment or decree of another State, no interest can be allowed unless proof is made of the law prescribing the rate of interest in that State.
7. The Appellate Court cannot judicially notice the table showing the rate of interest in the several States, required by law to be appended by the Secretary of State to the published acts of the Legislature. It must be offered in evidence in the primary court, that the opposite party may have an opportunity to contest its correctness.

ERROR to the Circuit Court of Dallas.
Tried before the Hon. E. Pickens.

This was an action of debt by Harriet Harrison against Margaret Harrison and Francis A. Saunders, the personal representatives of Kirkland Harrison, deceased, to recover from them, as such representatives, the sum of fifty-five thousand dollars, upon a decree of the Chancery Court of Fairfield District, in the State of South Carolina.

The case was submitted in the court below upon an agreed state of facts, and the pleadings were considered as made up to suit the facts thus agreed on, so as to present every legal question which could properly arise out of them. It was further consented, that the legal remedies of the parties should be finally and conclusively determined upon the statement of facts submitted, saving the right to bring the case to this court.

These facts are substantially as follows:

That the plaintiff, whose maiden name was Harriet Ellison without the addition of any middle name, was married to Kirkland Harrison, by that name, in 1828, in the State of South Carolina where the parties then resided, and continued to reside until 1834, when they removed from that State into Dallas county, Alabama, where they permanently settled. Harriet, the plaintiff, remained in Dallas county three or four months, and then returned to the residence of her mother in the State of South Carolina, where she has remained ever since; but Kirkland Harrison never returned to South Carolina after his removal, having continued to reside in Dallas down to the period of his death.

After the plaintiff's return to the State of South Carolina, viz: in 1835, she exhibited her bill in equity in Fairfield District against her said husband, in which she alleged:

1. Their marriage on the 18th March, 1828, in said District of Fairfield, and her removal to his house.

2. That shortly thereafter he became changed in his deportment towards her; unnecessarily absenting himself from home, leaving her unprotected; distant in his manner and harsh and offensive in his language, inducing her thus to expect from him nothing but insult and injury. That some four years after her marriage, his conduct became such, by reason of his threats, abusive language, repeated personal violence to her, and an attempt to ruin her character, that her parents came on a visit to the residence of her husband, and took her home with them to protect her against such ill-treatment.

3. That he afterwards visited her, and upon his solemn assurances of amendment, she returned with him to his residence, when he treated her without violence, but without any fixed sentiment of kindness.

4. That in 1834 they removed from South Carolina to Selma, Alabama. While on the way, said Kirkland relapsed into his former habits of harshness and cruelty, insulting and abusing her, and committing violence upon her by striking her in the mouth, and threatening to throw her into the river. That such treatment, coupled with her delicate condition as to health, rendered her situation arising from terror and distress of mind indescribable. That having arrived in the month of May at Selma, and finding her said husband bent on a fatal perseverance in his course of injury and insult towards her, and that her happiness did not in any manner enter into his views, as was manifest from the fact of his abandoning her bed, and taking to his embrace a negro woman belonging to him, with whom he slept in regular companionship, and meeting with an opportunity of quitting his home, she did return in company with her brother to the residence of her parents in South Carolina. That on her return, in the month of June, she availed herself of the hospitalities of a near kinsman in the State of Georgia, where she was delivered of a female child, which she alleged was still with her.

5. That said Kirkland had made no provision for the support of either her, or her child. That he had received from her father, on their marriage, property amounting in value to over two thousand dollars, which had since greatly increased, and which, or the proceeds thereof, he then held. That he had property in Alabama of very considerable value, and also

three negroes in Fairfield District in South Carolina, in the possession of one Morris, who was made a party to the bill, and that David Harrison and Richard Whitaker were indebted to said Kirkland, &c.

6. That said Kirkland has threatened to come into South Carolina, and take her and her child by force back to Alabama.

7. The bill prays for alimony by way of separate maintenance out of the estate of Kirkland Harrison, and that the complainant and her infant be protected in living separate and apart from her said husband, &c.

On the 6th February, 1836, Kirkland filed his answer to this bill, which was taken before commissioners appointed for that purpose. He very positively denies the allegations of the bill, and insists that upon the merits, no decree should go in favor of his wife; alleges his readiness to support her and his infant child at his residence, and prays that letters which he has written to her since her separation from him, making proposals for her return and comfort, may be produced. He however raises no question by his answer as to the jurisdiction of the Court of Chancery of South Carolina, to decree alimony under the facts alleged in the bill.

Proof having been taken, and the bill, answer and depositions being submitted for final decree, the Chancellor (Harper) proceeded to decree: "That the complainant be protected in living apart from her said husband, and in possession and charge of her infant child, and that Kirkland Harrison be enjoined from any attempt to molest or control said complainant, or to deprive her of the possession and charge of her said infant child; that it be referred tothe commissioner to inquire and report the entire value of the property owned by the said defendant, and the amount of his annual income, and that one third of the nett income be paid by the defendant to the complainant quarter annually in advance, for her maintenance; and that said commissioner inquire and report what would be a reasonable and proper allowance for the support and maintenance of said infant child, and that the amount reported be annually paid in like manner (by quarterly payments in advance,) to the complainant, in addition to the allowance for her own maintenance. The complainant to be at

liberty at any time to apply to the court for further direction with respect to the maintenance of herself and her child; and that the orders previously made in the cause by the Chancellor (Johnson) remain of force and be carried into effect until the further order of the court. The defendant to pay the costs." Signed by the Chancellor.

This decree is not dated.

The commissioner having ascertained and reported on the 17th day of January, 1837, that Kirkland Harrison's property amounted in value to about seventy-five thousand dollars, and that his annual income amounted to eight thousand five hundred dollars, and also, that one hundred dollars per annum was sufficient for the support of the infant child, the report was confirmed by the Chancellor on the 18th April, 1837.

On the 10th July, 1837, a further decretal order was made requiring the commissioner to sell the three slaves mentioned in the bill, which under a previous order had been placed in the possession of complainant's next friend; which order of sale was complied with, and the negroes sold for $730, on the 2d day of October, 1837, and the proceeds applied to the payment of the decree.

Afterwards, on the 28th June, 1838, the commissioner, to whom it had been referred to ascertain and report the amount due the defendant Kirkland Harrison from Daniel Harrison and Richard L. Whitaker, reported that he had found in their hands the sum of seven thousand one hundred and twenty-four dollars which amount he had received and paid over on the 25th day of September, 1837, to Wm. H. Ellison, the next friend of the complainant, Harriet Harrison, in pursuance of the order of the court made at the July term then last past. This report was likewise confirmed by the Chancellor.

It further appears from the transcript of the proceedings had in the Chancery Court of South Carolina, that on the 11th day of July, 1837, an order was made allowing the complainant as alimony, *pendente lite*, the sum of four hundred dollars, commencing from that date. It is stated in the agreement of facts that the commissioner in equity for Fairfield District proves that about $800 of Kirkland Harrison's property was attached in the Chancery suit in South Carolina, and that

this property was sold and realized that sum, and that such payment was made shortly after the decree was rendered.

The depositions of Messrs. Pettigrew and Hayne show, that the courts of South Carolina exercise jurisdiction over the subject of alimony, and in providing for the protection and separate maintenance of the wife, when the conduct of her husband is such as to call it into exercise.

After these proceedings were had in the State of South Carolina, to-wit: in 1839, the said Kirkland Harrison filed a bill for a divorce *a vinculo matrimonii*, in the Chancery Court of Dallas county, against his then wife, Harriet Harrison, naming her in the bill "Harriet *Y.* Harrison, formerly Ellison." The ground for divorce asserted by the bill, was the voluntary abandonment of the complainant by the defendant, for more than three years. No mention was made in the bill of the proceedings had in the Chancery Court in South Carolina, and the defendant being a non-resident, publication was made, and a decree divorcing the complainant from defendant was pronounced, upon proof of the allegations, in July, 1841. The record of this divorce was transmitted to the Legislature for its confirmation at the session of 1841–2, but no act was passed divorcing the parties until the 15th day of January, 1844. In this act Mrs. Harrison is called Harriet Y. Harrison.

In 1845 said Kirkland Harrison married Margaret Smith, and had by her one child now living; said Margaret being a party to this suit as his administratrix, he having departed this life in January, 1850.

The foregoing are substantially the facts, and the parties respectively consent in writing, that the decision of the cause and the judgment to be rendered upon them by this court be final and conclusive as to the *legal* rights of the parties.

The court below rendered judgment for the plaintiff below for the sum of $32,386 29, from which judgment the defendants below appealed to this court.

Lapsley & Hunter, for plaintiffs in error:

We maintain, 1st. That the South Carolina decree is wholly void for want of jurisdiction over the subject matter. The fact that Harrison put in his answer without objection

to the jurisdiction, cannot obviate the objection for want of jurisdiction of the subject matter, nor preclude his representatives from raising the objection. It is well settled that even express consent cannot give jurisdiction. See Wyatt v. Judge, 7 Porter 37; Merrell v. Jones, 8 ib. 554; Holcombe's U. S. Dig. pages 424, 425, 426, § 1, 6, 9; Elliott v. Peirsol, 1 Peter's R. 340; Hickey v. Stewart, 3 How. U. S. Rep. 750 and 762; 2 Kent's Com. 457; Mills v. Brown, 16 Peters 525; Story's Con., page 23, § 23; Hanover v. Turner, 14 Mass. 227.

What was the subject matter of the South Carolina suit? It was the marriage relation between the parties; it was not a mere civil contract, or matter exclusively personal as between themselves, but was the most sacred and important of all the domestic relations, a relation which, in the language of Judge Story, "is the very basis of the whole fabric of civilized society."

No independent State can, with justice to itself or safety to society, permit so delicate and important a matter as the marriage relation to be controlled or interfered with by a foreign tribunal. Every State has always most jealously maintained an exclusive control, not only over this, but over all the domestic relations. This exclusive and jealously guarded jurisdiction belongs to the State in which the parties have their domicil.

In this case, the domicil of the parties was in Alabama. They both removed and fixed their residence here, and were domiciled here before the departure of Mrs. Harrison from her husband. The wife leaving Alabama could not change that domicil, even as to herself. The husband's domicil is always that of the wife, and it is not in her power to change it. See Story's Conflict of Laws, page 44, § 46, and page 166, § 198. Dorsey v. Dorsey, 7 Watts 350; McGuire v. McGuire, 7 Dana, 181; Barbor v. Root, 10 Mass. 265; Harteau v. Harteau, 14 Pick. 181; Ford v. Ford, 14 Martin 574 to 578; Warrender v. Warrender, 9 Bligh. 89, 103 and 104; Glover v. Glover, 18 Ala. Rep. 367; and the decision of this court in Harrison v. Harrison, June Term, 1851.

This position is undeniable, and as a necessary consequence the want of jurisdiction in the court of South Carolina is

equally undeniable. If that court had not jurisdiction, how could it render a valid decree?

Upon reason, we can readily see that it might be ruinous to permit foreign interference with any of the domestic relations; if it may interfere with one of these relations, it may of course with all, and thus not only take charge of the relation of husband and wife, parent and child, guardian and ward, but with equal right of master and slave; and if one State can do it, all can do it. If South Carolina may control or interfere with the relation of husband and wife in Alabama, why may not Massachusetts interfere with that of master and slave? And this reasoning is fully supported by authority. See Dorsey v. Dorsey, 7 Watts 350; McGuire v. McGuire, 7 Dana 181; Story's Conflict of Laws, page 350, § 230, *a*; besides, our constitution and statutes have taken special and express charge of the marriage relation, and the State has made its own legislature and courts of chancery its depositories of this high and important trust. See Con. of Alabama, article 6 § 13; Clay's Digest, under the heads of Marriage and Divorce.

Should a man and his wife, while domiciled in Alabama, leave the State and obtain a divorce from a foreign tribunal, their domicil remaining unchanged, and return to this State, can it be contended that the decree would be valid here? It certainly would not be valid, but our courts would be bound to consider it a mere nullity. See Jackson v. Jackson, 1 Johns. R. 424; Hanover v. Turner, 11 Mass. R. 227, and cases cited, supra.

No reason whatever is shown why Mrs. Harrison could not have had, if mistreated, as complete redress in our courts as in those of South Carolina. If she had desired, she might still have remained in South Carolina, and have carried on her suit here by her agent or attorney.

But even if the objections urged above should be waived, and it were conceded that the court of South Carolina had the jurisdiction, the Alabama divorce would bar and estop the defendant in error from any recovery on her decree.

A subsequent adjudication always bars a former adjudication; both adjudications are founded on precisely the same fact, to-wit: her abandonment of her husband. Her bill and

decree charge that his bad treatment compelled that abandonment. His subsequent bill, decree and act of the legislature affirm that the abandonment was not caused by mistreatment, but was voluntary on her part. Shall a former adjudication by a foreign court prevail over the subsequent adjudication by our own highest court, confirmed by two thirds of our legislature, in a matter affecting the most important rights of a citizen? We think but one answer can be given to this question, an emphatic negative, and consider no authority on this point necessary.

The last adjudication would not only bar any recovery on the former, subsequent to the rendition of last adjudication, but would bar any recovery whatever; and this would be the case, even if both decrees had been rendered by competent courts in this State. Let us suppose a case. A and B fight. A sues B for assault and battery, and recovers, say one hundred dollars of B; subsequently B brings his action against A for the same assault, and the defendant fails to plead the former adjudication, but permits B to recover and obtain a verdict for, say two hundred dollars. A then attempts to collect his judgment by execution; can any one doubt that B could supersede it and have satisfaction entered, by setting up and proving his adjudication?

But it may be said that this doctrine of estoppel cannot apply in this case, because there is no proof of personal service on Mrs. Harrison. The answer to this objection is obvious. Under our statute, publication is made equivalent to personal service, and by legal intendment we must hold that she had, and received through the publication, actual notice of the suit. The statute expressly provides that a decree, rendered on notice by publication, shall be in all respects as conclusive as if rendered on personal service. See Clay's Digest, page 352, § 44.

Even out of this State the decree of divorce rendered here, to say the least, would be *prima facie* good, and *prima facie* unrebutted by evidence is conclusive. See Planters' and Merchants' Bank v. Borland, 5 Ala. Rep. 351.

In this view it is important to observe, that there is no evidence *aliunde* to show what were the real facts of the abandonment, and we are left to ascertain these facts from the legal

effect of the two records; and Mrs. Harrison, having failed to set up her adjudication against the suit here, and failed to come in and set aside the decree within three years, and now failing to produce any extrinsic evidence to show the real facts, but reposing entirely on her former adjudication, clearly stands concluded and estopped. Independent of this, a divorce decree is a decree *sui generis*, and must, from its nature, when effectual to dissolve the marriage at the place of its rendition, be conclusive of its dissolution everywhere. See 9 Greenl. R. 140; Tolen v. Tolen, 2 Blackford's Indiana R. 407; Mansfield v. McIntire, 10 Ohio R. 27; Page's Law of Divorce quoted at page 298 of U. S. Law Magazine, November No. for 1850; ib. pages 297, 298, 299.

GAYLE & GAYLE, S. F. RICE and BOYCE, *contra:*

1. The bill of Mrs. Harrison in South Carolina is not for cruelty in Alabama merely, but for cruelty in South Carolina, (the place of her marriage,) begun there, continued there, and continued in Alabama. The bill may show something like *condonation* as to the cruelty in South Carolina; but condonation is forgiveness, with an implied condition that the injury shall not be repeated, and that the wife shall be treated with conjugal kindness; and on breach of this condition, the right to a remedy for former injuries revives. Upon this foundation the bill is securely rested, and the jurisdiction of the South Carolina court firmly planted. 2 Greenl. on Ev. § 53; Gist v. Cattell, 2 Desaussure's Eq. R. 54. She never parted with "the remedy of past transgression." Story's Con. of Laws, § 230, *a*.

To deny jurisdiction of the case thus presented by the bill to the Chancery Court of South Carolina, is to deny to that court the power to protect a wife against any and all brutal treatment of her husband, committed in that State, and although the parties married in that State and were citizens of that State when the cruelty occurred; or to deny jurisdiction in such case, is to hold that the flight or removal of the offending husband fron South Carolina, he taking with him his injured wife, will *oust* the courts of that State, of the jurisdiction which it had until such flight or removal. It is to hold, that the Courts of Equity of that State are rendered powerless

to afford relief to the injured wife, by fraudulent and voluntary act of the offending husband; an act, too, which appears to have been performed with intent to separate her from her native home and her acquaintances and relations, and to make his power more absolute and despotic over his victim. Glover v. Glover, 18 Ala. Rep. 371; Glover v. Glover, 16 Ala Rep. 440; Smith v. Beavers, 11 Ala. Rep. 20; Priest v. Cummings, 16 Wend. Rep. 20; Shanks v. Dupont, 3 Peters' Rep. 242.

Protection and allegiance are reciprocal, they must exist together. The incapacities of *femes covert* do not reach their political rights, nor prevent their losing or acquiring a national character. Shanks v. Dupont, 3 Peters' 248; Priest v. Cummings, 16 Wend.

The incapacities of *femes covert*, provided by the common law, apply to their civil rights only, and are for their protection and interest. (See cases above cited.) And whenever the conduct of the husband is such, that the continuance of these incapacities is not for the "protection and interest" of the wife, and that he is attempting to avail himself of these incapacities of his wife to injure and oppress her, the courts will hold that her capacities to contract and to sue are restored; and in such case, she may leave the State where her husband resides, and enforce her rights in another State; especially in the State of her original or native domicil. Roland v. Logan, 18 Ala. Rep. 307.

A married woman abused and maltreated by her husband may have her residence (or domicil) in one State, (Virginia,) whilst her husband's residence or domicil is in another, (Alabama.) Such was the case in Glover v. Glover, 18 Ala. Rep. 367.

Why did not the husband in his bill for divorce ask for a perpetual injunction against the decree in South Carolina? Suppose he had, could the court in Alabama, even in a direct proceeding, enjoin it? It is said by defendant that it can be done indirectly in this action of debt!

It is a fallacy, to suppose that the exercise of jurisdiction to decree to a wife alimony or separate maintenance, is the assumption of jurisdiction over the relation of husband and wife. This case furnishes a striking illustration of the differ-

ence. The courts of South Carolina avow that they have no jurisdiction over that relation; that is, they cannot annul or destroy that relation; that they cannot grant a divorce, either *a mensa et thoro* or *a vinculo matrimonii.* But recognizing the relation of husband and wife as indissoluble by them, the courts of that State will protect the wife against the brutality of her husband, by decreeing to her a separate maintenance; the cause of action in such suit, is the refusal of the husband to perform the contract which the law imposes on him, of maintaining and supporting his wife, and ill usage of her by him. Anonymous, 2 Dessaussure's Equity Rep. 199, 201, 202; Iclinean's case, ib. 45.

Laws passed or remedies allowed to protect slaves even against the cruelty of their masters, have never been supposed to interfere with the relation of master and slave, or to give the courts jurisdiction of that relation. So laws and remedies for the protection of a wife against the ill usage of her husband do not interfere with the relation of husband and wife.

The wife having brought suit in the proper court in South Carolina against her husband for his ill usage, and having proved her cause of action, and obtained a decree for certain annual sums of money until one of the parties dies, the subsequent application of the husband for a divorce *a vinculo* in Alabama and the decree therein cannot amount to a reversal or limitation, either total or partial, of the former decree in South Carolina. Leavitt v. Smith, 7 Ala. Rep. 175.

In the application of legal principles, we must look to other principles, and so apply them that the whole may be in harmony and consistency. This is illustrated in Verdier v. Hyrne, 4 Strobhart's Law Rep. 470.

Now the decree in South Carolina and the decree in Alabama may be harmonized. Each is on a totally different subject matter; each had a totally different object. The latter decree was not intended to affect, in any way, the former decree. It was not intended to take away from the wife any sum of money which had, during the coverture, been formerly adjudged to her by any court of competent jurisdiction; it was not intended even to decide that she was not to have any interest in her husband's estate after the divorce. The whole

effect of the decree of divorce is, that the marriage relation was dissolved from its confirmation by the legislature, and that the husband could not afterwards be charged with the performance of the obligations. See the decree of divorce itself.

The judgments of courts of sister States are not inferior to simple contract debts, 5 Johns. Rep. 132; they are of higher grade than a speciality. Keith v. Estill, 9 Porter 669. Suppose the husband had, during the coverture, entered into a valid, simple contract, to pay an annual sum of $3000 to a third person as trustee for his wife, until he or his wife died, unless, in the meantime, he and his wife became reconciled, would his subsequent divorce affect the contract? Whatever effect the decree, in favor of plaintiff, would have in South Carolina, must be accorded to it here. Mills v. Duryee, 7 Cranch, 484.

Although it may be true, that after a divorce granted to the husband the wife cannot, by bill in chancery, recover a separate maintenance or alimony, yet, if, before application for such divorce, she has, by the judgment of a competent court, recovered a separate maintenance to be paid annually to her, until either she or her husband dies, or until they are reconciled, such recovery cannot be defeated, either totally or partially, by any subsequent act of the husband, or of a different court at his instance, except the acts contemplated by such recovery, to-wit: his death or his reconciliation with his wife.

Where a recovery of a competent court expressly provides, that after the happening of either one of three certain named contingencies, (to-wit: 1st. The death of the wife; 2d. The death of the husband; 3d. Reconciliation of the husband and wife,) nothing more shall accrue on such recovery, no other court on earth can add a fourth contingency, (to-wit: Subsequent divorce *a vinculo*,) after the happening of which nothing further shall accrue on such recovery.

The courts of Alabama cannot add to, or amend the decrees of the courts of a sister State, nor exercise appellate power over them, nor reverse or annul them, either totally or partially, unless a want of jurisdiction or fraud in the courts of the sister States is shown.

The foregoing views proceed on the concession, for the sake of the argument, that the decree of divorce is not void. But this concession is wrong, for that decree is void.

The application by the husband for the divorce is not a proceeding *in rem*, but *in personam*. The principle is universal, that a proceeding *in personam* is void, unless either actual notice or constructive notice is given to the party to be affected thereby. McCurry v. Hooper, 12 Ala. Rep. 826; Kilburn v. Woodworth, 5 Johns. Rep. 40; Puckett v. Pope, 3 Ala. Rep. 552. No actual notice was given to the defendant in the suit for divorce.

The question then comes to this, was constructive notice of that suit given to her? The constitution of Alabama declares that divorces *a vinculo* "shall not be granted, but in cases provided for by law, by suit in Chancery."

The only law providing for such suit against a non-resident prescribes the form of procedure in giving constructive notice. It says, "Order of publication shall be made as in other cases of non-resident defendants, except that the order shall succinctly state the object of the bill." Clay's Dig. 170, § 5.

The proof in this cause shows positively that this law has not been followed, but has been palpably disregarded! The law said that an "order of publication, succinctly stating the objects of the bill," should amount to constructive notice to defendant; but no law of Alabama accords to any other kind of order of publication, in a suit for divorce, the effect of constructive notice. No constructive notice has been given; no actual notice has been given; yet a divorce has been granted against a non-resident. No law has provided for the granting of a divorce against a non-resident, on such an order as shown in this suit; and the Constitution restricts the power and jurisdiction of the Chancery Courts of Alabama to "cases provided for by law." The statute passed in pursuance thereof gives the power to decree divorces, with this restriction, "in the manner prescribed by law, and in the following cases." Clay's Dig. 170, § 3. This restriction contained in the Constitution likewise extends to the power of the legislature in its action on a decree for divorce. The legislature has no power to act upon cases "provided for by law;" and according to the laws in existence the legislature had no pow-

er to confirm a decree of divorce, if it was presented and not confirmed, "within and during the ensuing session" next after the decree for divorce. Clay's Dig. 171, § 10.

If the legislature, at its first session, when the decree was presented, did not confirm it, but laid it on the table; that was either a rejection or in the nature of a discontinuance, and no power existed afterwards to confirm it.

CHILTON, J.—We have listened with much attention to the able arguments of the respective counsel engaged in this cause, and have carefully examined the several positions and numerous authorities submitted by them, and having given to the case the consideration which the novelty and importance of several of the questions involved in it demand, it is made my duty to announce, as briefly as I may, the conclusions attained by the court.

1. The first and most important inquiry is, had the Chancery Court of the State of South Carolina jurisdiction to render the decree here sued upon. If it had not, an end is at once put to the case.

No principle of law appears to be more generally recognized, or better established by judicial decisions, than that the domicil of the husband determines that of the wife. Mr. Phillimore, in his work on Domicil, (p. 27,) says: "The maxim of the Roman and continental civilians, as also of this country and America, is, that as the wife takes the rank, so she does the domicil of her husband."

Judge Story, in his work on the Conflict of Laws, § 46, says: "A married woman follows the domicil of her husband. This results from the general principle, that a person who is under the power and authority of another, possesses no right to choose a domicil."

In legal contemplation, husband and wife constitute one body, and cannot be domiciled in different States, so long as the relation upon which their legal identity depends, remains unimpaired. Dougherty v. Snider's Ex'r. 15 S. & R. 84, 90.

2. Applying this well established rule of law to the case before us, it is quite clear, that upon the removal of Kirkland Harrison and the plaintiff below, who was then his wife, from the State of South Carolina, and their permanent settlement

in Dallas County in this State, the latter place became their domicil, and that the return of the wife to the place of their former residence in South Carolina, within a few months after their removal to this State, in no wise operated to change that domicil. At the time Mrs. Harrison filed her bill in the Chancery Court of Fairfield District, in the State of South Carolina, her *legal* domicil was in this State, although she resided in that, which was her matrimonial as well as *actual* domicil.

In Donnegal v. Donnegal, 1 Ad. Ecc. Rep. 19, it was said that a party may have two domicils, the one actual, the other legal, but that the husband's actual and the wife's legal domicil are one, wheresoever she may be personally resident. See also Shackell v. Shackell, and Warrender v. Warrender, cited by Mr. Phillimore on Domicil, p. 31.

Having shown that, at the time of the exhibition of the bill by Mrs. Harrison, both she and her husband were legally domiciled in this State, it remains to consider whether, conceding this fact, the jurisdiction of the court as respects the subject-matter of the bill attached, and what effect the actual non-residence of Kirkland Harrison had upon its power to proceed.

3. It is insisted, on the part of the counsel for the appellant, that the subject-matter of the South Carolina controversy was the marriage relation existing between these parties. They contend, that upon the removal of the parties to this State they brought with them that relation, and that the duties and obligations imposed upon them as springing out of it, not only as affecting themselves and their family, but also as affecting society with which they stand connected, must be under the sole regulation and control of our own law, and not the law of a foreign jurisdiction.

Now, it is most unquestionably true, that no independent State could for a moment tolerate any interference on the part of a foreign tribunal with this, the most sacred and important of all the domestic relations which obtain among its citizens. It is a relation, the intermeddling with which involves consequences most usually reaching far beyond the immediate parties to it, as it lies at the very basis of civilized society, and becomes so interwoven with its very framework, as to

render it the peculiar object of exclusive control, by the laws and tribunals where it exists. So that, had the State of South Carolina attempted to annul the marriage, it is very clear the subject-matter, the marriage relation, being without the jurisdiction of that court, its sentence would have been utterly void, and no consent could have given it jurisdiction; for the rule is too well settled to admit of any doubt, that consent in such case cannot confer jurisdiction. 2 Bacon's Abr. (Bouv. Ed.) 618; Wyatt v. Judge, 7 Por. R. 37; Merrill v. Jones, 8 ib. 554–6; McCall v. Peachey, 1 Call, 55; Lindsay v. McClelland, 1 Bibb, 263; Brown v. McKee, 1 J. J. Mar. 476; see also Story's Conf. of Laws, § 230, a.

In the case of Hanover v. Turner, 14 Mass. Rep. 227, which was an action of assumpsit against the husband for necessaries furnished the wife, who had, by his cruel treatment, been forced to abandon him, the husband pleaded that he had obtained a divorce from his wife anterior to the furnishing of the supplies to her; but it appeared he had gone to Vermont, and resided temporarily in that State for the purpose of obtaining a divorce, the wife never having been within that jurisdiction, and that the alleged ground of divorce took place in Massachusetts, the State of their permanent domicil. The court held the divorce granted by the Vermont court utterly void, and said: "If we were to give effect to this decree, we should permit another State to govern our citizens, in direct contravention of our own laws, and this can be required by no rule of comity." Such is undoubtedly the correct rule of law, and we recognize it to the fullest extent; but upon a calm and careful review of the facts of this case, we feel constrained to hold that they do not bring it within the influence of this principle.

4. In this case the parties were married in South Carolina, and resided permanently there for several years, and assuming the jurisdictional facts stated in the bill to be true, as we must when the judgment or decree is collaterally attacked, it appears the husband, while domiciled in that State, by his improper conduct towards the wife, furnished her the cause of complaint, which is made the ground of the relief afforded by the decree now sued upon.

While resident there, a separation took place, by reason of

his mal-treatment, and Mrs. Harrison was induced to return to him, upon his promise of amendment and future kind treatment. This promise he failed to redeem, and by his failure deprived himself of the benefit of the intervening pardon or condonation of the wife. She became thereupon remitted to her original remedy afforded by the tribunals of that State, for the cruelty and abuse inflicted upon her. Condonation is accompanied with an implied condition that the injury shall not be repeated, and that the repetition of the injury takes away the condonation, and operates a revivor of former acts. Durant v. Durant, 1 Hagg. Ecc. Rep. 761; ib. 781; ib. 130; Shelford on Divorce, 446, mar. p. Besides, this doctrine of forgiveness as a bar, is not presumed so readily against the wife as the husband, for it is esteemed both legal and meritorious for her to be patient under her suffering, stimulated by the hope that by her meek and proper deportment toward her husband she may win him back to a sense of duty, and produce in him a reformation. Forbearance, therefore, to abandon him and sue, does not weaken her title to relief. Durant v. Durant, supra; Shel. on Div. 448.

It is very clear that, according to the facts of the case presented by the record of the wife's recovery in the Chancery Court of Fairfield District, she had a right, before her removal to this State, to relief against her husband, according to the law as administered in the Chancery Courts of South Carolina. That relief would not extend to annulling the marriage, for it appears that divorces are never granted in that State; but it extends to the protection of the wife, and a provision for herself and infant child, by way of maintenance or alimony, to continue until the husband is willing to take his wife back and treat her with conjugal affection. The marriage remains of force notwithstanding the decree, and the husband is shorn of his power to inflict further injury upon his wife, whom, by his bad conduct and ill treatment, he has driven from his house. Although her legal domicil was in Alabama, yet she was *actually* resident in South Carolina, and as such, entitled to the protection afforded by the laws of that State. Had her husband gone there and attempted violence upon her, or by force to take her out of that jurisdiction, so as to continue his cruel treatment towards her, we entertain no doubt as to

the powers and jurisdiction of that court to restrain him, and to grant the relief usually afforded in such cases. He was subject to be proceeded against before he left, and being found within the jurisdiction, even temporarily, the wife could enforce against him her claim for maintenance, while the court would provide for her protection by restraining him from molesting her. The question of legal domicil would interpose no obstacle in such case; for when it is necessary to the protection of the wife against the actual or threatened injury of the husband, the law (and much more will equity) pretermits the legal fiction of their unity. It is upon this principle that she may give evidence against her husband when prosecuted for injuries inflicted upon her, and compel him to find sureties for the peace. 1 Greenl. on Ev. § 343.

The transfer of their domicil to this State does not destroy the wife's right to proceed in South Carolina, for a ground of complaint complete in that State before their removal, provided the parties can be subjected to that jurisdiction by being personally served with the process of the court.

In Dorsey v. Dorsey, cited by Mr. Justice Story in his Conflict of Laws, § 230 *a*, Mr. C. J. Gibson, after stating that the transfer of allegiance and domicil is a contingency which enters into the views of the parties when they contract marriage, and of which the wife consents to bear the risk, proceeds to say, that "by sanctioning this transfer beforehand, we consent to part with the municipal governance incident to it; *but with this limitation, we part not with the remedy of past transgression.*"

It follows, therefore, that unless there was a want of jurisdiction as to the person of the defendant, the South Carolina decree is valid, since it does not annul or attempt to impair the relation of marriage, but only affords a remedy for the violation of obligations, and seeks to enforce duties growing out of that relation.

Upon the subject of the jurisdiction as affected by the non-residence of Kirkland Harrison, a few words may suffice. Conceding that he might have availed himself of his residence in this State to have defeated a recovery, we think it clear that his failure to raise the objection must be regarded as a waiver of it. The rule appears to be well established, that

where the court has jurisdiction of the subject-matter, and the party is privileged from its jurisdiction, he may waive such privilege. 2 Bacon's Abr. by Bouvier, 618, and authorities there cited. It is also settled, that pleading to the merits, or submitting to answer without raising the objection to the jurisdiction on account of such privilege, is a waiver of the objection. Daniel's Ch. Pr. 715; Story's Eq. Pl. § 721, and cases there cited.

These considerations lead us to the conclusion, that the decree sued on is not void for want of jurisdiction.

5. But it is strenuously urged that, conceding the Chancery Court of Fairfield District had jurisdiction to render this decree, the divorce which the husband subsequently obtained from the plaintiff below, operates a complete bar to her recovery. On the other side, it is replied, that the divorce is void for want of jurisdiction over the person of the wife; or that, conceding it to be valid, the previous decree in South Carolina having determined upon the death of one of the parties or their reconciliation, as periods when the provision for the wife's support should cease, the Chancery Court of this State could not add to that decree, by holding the provision should cease upon their divorce.

We shall not stop to inquire whether this divorce was regularly obtained, and was binding upon these parties. That identical question was before us at a previous term of this court, and after a full examination, we determined that the decree was not void. The subsequent argument of the point, and the additional grounds taken, have failed to shake our opinion in the correctness of that decision.

But although that decree was predicated upon the ground of the wife's abandonment of her husband, we think it by no means follows that it estops the wife, from recovering the amount decreed before its rendition as a provision for her support. No case has been cited, and we have been unable to find one, which holds, that a subsequent decree of divorce has the effect to vacate and avoid, in this indirect manner, a moneyed decree previously rendered, as to the amount due upon it anterior to the divorce. To hold that the decree of divorce should have the effect of vacating the previous decree for the alimony due anterior to its rendition, would be to al-

low the party to do indirectly, what he could not have accomplished by a direct proceeding.

We are of opinion that both decrees may stand, so far as in their results they are not incompatible with each other. The subject-matter and object of each are wholly different. The first seeks to enforce the obligations and duties springing out of the relation of marriage; the second, entirely to annul that relation, and having effected the contemplated object, puts a period to the operation of the first, which is necessarily dependent upon that relation. True, the South Carolina court, not recognizing the doctrine of divorce, did not fix upon that as a period terminating the provision made by its decree for the wife; but when she seeks her remedy in this State, where divorces are granted, she submits to the law of the *forum* governing that remedy; and as by this law an end has been put to the relation of marriage, as effectually as would have resulted from the death of either of the parties, as a consequence, all duties and obligations necessarily dependent upon the continuance of that relation, immediately cease.

After the best reflection we have been enabled to bestow upon this case, we come to the conclusion, that the plaintiff below is entitled, according to the decree which is the foundation of her action, to recover one-third of the nett annual income of her late husband, estimated to have been annually, $8,500, from the 18th day of April, 1837, down to the time of the divorce, which was the 15th January, 1844, embracing a period of seven years, less three months and three days.

The judgment of the Circuit Court, which is based upon an extension of the period to the death of the husband, is clearly erroneous, and must be reversed; and judgment must here be rendered for the correct amount, which is computed as follows: One-third annual income from 18th April, 1837, to 15th January, 1844, say six years and nine months, less three days, is $19,101 $\frac{38}{100}$; from this sum must be deducted the sum of $730, the proceeds of the sale of the slaves, and also the sum of $7, 124, the moneys collected by the Commissioner from Messrs. Harrison and Whitaker, and paid to the complainant in South Carolina, leaving the amount for which judgment must be here entered $11,247 $\frac{38}{100}$.

6 and 7. It is settled, that in the absence of evidence as to

the interest law of another State, none can be calculated; neither can this court judicially know the interest allowable in South Carolina, from the table required to be appended by the Secretary of State to the published acts of the Legislature. This point has several times been decided by us. Such evidence should have been offered in the primary court, that the opposite party might have controverted it, had he seen proper to do so.

Let the judgment be reversed, and accordingly rendered, to be levied of the goods and chattels of the intestate in the hands of the plaintiffs in error unadministered, and let the plaintiffs in error recover their cost.

COLGIN ET AL. *vs.* REDMAN ET AL.

1. A creditors' bill, filed by the beneficiaries, for the settlement of a deed of trust executed by the debtor, which required that the secured creditors should assent to its provisions within six months, must allege that the complainants assented to the deed.
2. An allegation that the complainants "have consented to the provisions of said deed," is sufficient, although the deed requires that they should assent to it "*within six months.*"
3. The rule which requires a dismissal of the whole bill, if any one or more of several co-complainants fail to make out their case, has never been applied with any stringency to creditors' bills; and unless a misjoinder of such complainants will affect the propriety of the decree, the objection will not be allowed to prevail in any case, when taken for the first time at the hearing.
4. Even if the objection for misjoinder of complainants were allowable in cases of creditors' bills, it should be interposed by way of demurrer; and the cases are exceedingly rare, if they exist at all, in which demurrers to creditors' bills for misjoinder of complainants will be sustained.
5. A bankrupt is not a competent witness to testify for his assignee, for the purpose of increasing the fund in his hands; but when his testimony tends to decrease that fund, he is considered as swearing against his interest, and is competent.
6. The mere fact, that a witness is a party to a suit in chancery, does not render him incompetent. If he has no interest in that part of the litigation about which he is called to testify, or if, being interested, he is examined as to matters which militate against that interest, he is perfectly competent.
7. Where a bill is filed by the secured creditors, for the settlement of a deed of trust, the maker of the deed, although he is a defendant to the bill, is a compe-

tent witness for one of the complainants, to prove the *bona fides* of his debt and his assent to the deed, it being shown that after the execution of the deed he had obtained his discharge in bankruptcy.

8. An objection to a deposition, on account of the incompetency of the commissioner to act as such, cannot be taken for the first time at the hearing. The objection should be taken and reserved at the time of filing the cross-interrogatories.

9. Mere identity of name, of itself, is not sufficient to establish the fact, that the commissioner, before whom a deposition is taken, is the same person who is shown by the papers of the cause to be an interested party, and therefore incompetent to act as commissioner; nor will the deposition be suppressed, on account of the bare identity of name.

10. Orders for the examination of a defendant as a witness for the complainant are made as matters of course, reserving the question of his competency to be made at the hearing; and there is no rule requiring an affidavit to be previously made of his want of interest.

11. A deed of trust contained the following provisions, viz.: "They (the trustees) shall pay and satisfy the following debts of the party of the first part, *in the following order*, to wit: first class," &c. (naming them.) "The above demands compose the first class of preferred creditors, being principally endorsers, securities, and those who advanced money to the said party of the first part, and all are to be first satisfied and discharged in full. The second class comprises the following claims," &c., (naming them), "which shall be paid ratably and proportionably, after the entire discharge of the debts in the first class enumerated." *Held*,

That the word "order" referred to the division of the debts into *classes*, and not to the *relative position* of the debts specified in the first class; and that the funds, being insufficient to satisfy all the debts of the first class, must be divided ratably among those who assented to the deed within the time therein specified.

ERROR to the Chancery Court of Sumter.
Tried before the Hon. Anderson Crenshaw.

The facts of the case, so far as they are necessary to an understanding of the opinion and of the errors assigned, appear in the opinion of the court.

BLISS & REAVIS, for plaintiffs in error:

1. The bill is wanting in equity, because the deed of assignment, (which is an exhibit to the bill), requires the assent of the creditors, within six months, and provides for the postponement of those who fail to signify their assent within that time; and the bill does not allege that the complainants assented within the time prescribed, but merely alleges, that they "consented to the provisions of the deed." This allegation is insufficient to show their right to call for an account

of the trust fund; for it may be perfectly true, and still the complainants may not have assented within the time prescribed by the deed. Applying the rule, that the allegations of a bill are to be construed most strongly against the complainant, Andrews v. McCoy, 8 Ala. Rep. 925; Lockard v. Lockard, 16 Ala. Rep. 450, this bill is fatally defective; and the motion to dismiss it for want of equity, should have been sustained.

2. The complainants, Anderson and Bruce, failed to obtain a decree. The bill, therefore, should have been dismissed as to all the complainants; for the rule is, that if any of the complainants fail, the bill must be dismissed as to all. Moore v. Moore, 17 Ala. Rep. 631; Wilkins v. Judge, 14 ib. 135; Hardeman v. Sims, 3 ib. 747; 1 Dan. Ch. Prac. Perkin's ed. 350.

3. The deed authorized the trustees to pay the debts in the first class, in the order in which they are there set down. It purports to convey all the grantor's property, and provides, that the trustees, with the proceeds, after paying the amount of a certain execution which was a lien on the property conveyed, "shall pay and satisfy the following debts of the party of the first part, in the following order, to wit: the first class." In reference to the debts set down in the first class, the deed declares that, "the above demands comprise the first class of preferred creditors, endorsers, securities, and those who have advanced money to the said party of the first part, and all to be first satisfied and discharged in full." The terms, "shall pay and satisfy the following debts, in the following order," must refer, either to the order in which the debts in the first class are set down, or to the order of the classes. They cannot refer to the order of the classes; for the deed shows that the property conveyed was not sufficient to "pay and satisfy" the debts in all the classes; and it provides, that the debts in the second and third classes shall be paid *pro rata.* There would be an incongruity in saying that the terms, "pay and satisfy the following debts, in the following order," "in full," refer to the classes, two of which are not to be paid in full, but *pro rata.* They must, therefore, refer to the order in which the debts in the first class are set down, and mean that each creditor, in the first class, is to be paid in full, as

he becomes entitled. This construction is strengthened by the fact shown by the deed, that all the debts for which sureties or endorsers were bound, (for which, it is to be presumed, the grantor intended first to provide), are set down in the first class, before any other.

If this be the true construction of the deed, the chancellor ought not to have rendered a decree for an account; because the answer, in response to a special interrogatory as to the amount realized from the trust property, states it to be $2100 less than enough to pay the debts in the first class, which have precedence of those of the complainants. Stamps v. Bracy, 1 How. Miss. 302. Or, if a decree for an account were proper, it should have been based upon the construction of the deed insisted on in the answer, and now contended for.

4. If this construction of the deed be wrong, still, a decree should not have been rendered in favor of Redman. Colgin insists, in his answer, that the debt to Redman, provided for in the first class, was without consideration, and was fraudulent, so fas as the other creditors are concerned. The testimony of Allen sustains the answer on this point; and there is no proof of a consideration, except what is to be found in the depositions of Henry and Phineas Fowlkes. The motion to suppress these depositions ought to have been sustained. The deposition of Henry should have been suppressed, for the following reasons; 1. Because he was interested to increase the fund for the payment of his debts. Powell v. Powell, 10 Ala. Rep. 910-11; Hayden v. Cornelius, 12 Miss. Rep. 321. 2. Because he failed to answer the cross-interrogatories, mentioned in the motion to suppress, sufficiently. Stonebreaker v. Short, 8 Barr, 155; Ketland v. Bisset, 1 Wash. C. C. Rep. 144; Dodge v. Israel, 4 Wash. C. C. Rep. 323; Bell v. Davidson, 3 ib. 328; Nelson v. United States, 1 Peters' C. C. Rep. 235; Mosely v. Mosely, Carri. & Nor. Rep. 522; Spence v. Mitchell, 9 Ala. Rep. 744. 3. Because he was a party defendant, and the order to take his testimony was without notice, and without any affidavit or suggestion, that he had no interest in the cause.

The deposition of Phineas Fowlkes should have been suppressed, because he was surety for the debt to the com-

plainant Bruce, and therefore interested. McCall v. Sinclair, 14 Ala. Rep. 764.

If, however, these depositions were admissible, they, together with the other testimony on behalf of Redman, do not prove the validity of his debt. This testimony shows, that shortly after, Redman was following the business of a wagoner, and then engaged for a short time in selling slaves for other persons, at fifteen dollars a month. Fowlkes owed him $17000, and he owned from twenty to thirty slaves besides. This is incredible in itself, and cannot outweigh the evidence of Allen. Besides, the facts, that Redman was in poor circumstances, and employed at a small salary a short time previous to his removal to Alabama; that he had no ostensible property; that he told Allen, as late as 1839, that he was poor, and dependent on his profession; that Fowlkes never had any thing to represent so large a debt as he pretended to owe Redman; that his books did not show any transactions with Redman; that he and Redman had secret interviews on the eve of making the assignment; that they were on terms of great intimacy; and that Fowlkes refused to answer the cross-interrogatory calling upon him to state whether he received a full, fair, and honest consideration from Redman, for the note, raise so strong a suspicion against the validity of Redman's debt, as to overcome the evidence of Henry and Phineas Fowlkes, as to the consideration of the note, however positive it may be. Nelson v. United States, 1 Peters' C. C. Rep. 235.

5. Colgin is a creditor provided for in the deed, as well as trustee, and, having no notice at the time he became a party to it, that Redman's debt was fraudulent, he has the right upon discovering the fraud, to resist paying the debt, out of the trust fund, in which he, as a creditor, is interested. His being trustee, cannot affect his rights as a creditor. Drake v. Moore, 18 Ala. Rep. 597; Stamps v. Bracy, 1 How. Miss. Rep. 312.

J. B. Clarke, *contra:*

1. The maker of the deed of assignment intended to place all the creditors named in the first class on an equality; else why classify them at all? This intention is arrived at

by an examination of the whole deed; not from any single clause; not by giving a particular expression a controlling force. Watts v. Sheppard, 2 Ala. Rep. 434; Bates v. Bank of Ala. ib. 473–4; ib. 477–8; 9 Pick. 422.

And in construing this deed, we must not forget that *equality is equity;* that we must give it a *reasonable and probable* construction, 1 Sup. U. S. D. 70, § 285.

2. The objection to the joinder of complainants who failed to make out their interest came too late at the hearing for the first time, and was properly disregarded, as their joinder in the bill did not affect the propriety of the decree. Newhouse and others v. Miles, &c., 9 Ala. Rep. 460; Watertown v. Conner, 4 Paige, 510; Story's Eq. Pl. § 544.

3. The motion to suppress the depositions came too late, being made for the first time at the hearing of the cause. Beattie, Adm. v. Abercrombie, &c., 18 Ala. Rep. 9.

4. The rule that a deposition can be suppressed, because some of the cross-interrogatories were not answered, has never prevailed in Alabama.

5. An order to take the deposition of one defendant, to be read against another, is taken as a matter of course, and requires neither notice, nor affidavit to obtain it. 2 Daniel's Ch. Pr. 1044.

6. A discharged bankrupt has no disqualifying interest left in him. Kyle & Gunter v. Bostick & Sherrod, 10 Ala. Rep. 589.

7. If, however, H. A. Fowlkes had any interest, he was testifying against that interest; the same as to Phineas Fowlkes.

8. A trustee under a deed of assignment can never question the *bona fides* of the deed, or any debt secured thereby; and being a beneficiary under the deed can make no difference. He must, before he can be heard to speak, restore the parties to where they stood before he accepted the trust. Mills v. Angell, 6 Paige, 481.

LIGON, J.—The bill in this case was exhibited by certain creditors of Henry A. Fowlkes, in behalf of themselves and such other creditors of said Fowlkes as might join in the suit, and contribute to its expenses, against said Fowlkes, and

John Colgin and Edward C. Mosby, who were named trustees in a deed of trust made by Fowlkes for the benefit of his creditors. By the terms of the deed the creditors are divided into classes, and are required to assent to the provisions in their favor within six months, or forfeit their priority. The complainants in the bill, and Colgin, the defendant, who is also a creditor, are put in the first class, and the questions raised by the errors assigned and insisted on, except objections to testimony and matters of practice, relate solely to the *bona fides* of Redman's debt, and his assent to the provisions of the deed in his favor, both of which are controverted in the answer of Colgin.

Before I consider these points, I will proceed to dispose of the preliminary questions, made and decided at the hearing.

1. It appears that a motion was made, at the hearing, to dismiss the bill for the want of equity, because it was not alleged in it that the complainants signified their assent to the provisions made in the deed of trust in their favor, in the time prescribed by the deed itself, which is made a part of the bill. An allegation of this kind I esteem indispensable to the equity of this bill, for it is filed solely for the purpose of settling the affairs of the trust, and distributing the funds arising under it. Before the complainants can be heard, they must show in their bill that they have complied with the terms of the deed, by which alone they can become entitled to the preference they claim by their bill. This they have sufficiently done; for the bill, after making the deed a part of it, and reciting all its important provisions, contains the following allegation; "Your orators further say, that they have consented to the provisions of said deed, in which they were secured, or intended to be secured, in the first class," &c. This cannot be understood in any other sense than as alleging that they had assented to the deed within the time prescribed by its terms. The allegations in a bill must be certain to a common intent; and in order to render any of them so, the court will look to others on the same subject, standing in intimate and close connection with it; and especially so, when, by detaching it from the balance, it would be useless and unnecessary, but taken in connection with them, it becomes pertinent, necessary, and proper. The

rule which requires doubtful or equivocal allegations to be taken most strongly against the pleader, does not authorize the court to wrest an allegation from its context, and by this method of isolation to render it insufficient and uncertain.

2. It is also urged, that, inasmuch as the complainants, Anderson and Bruce, failed to prove their demands against the trust fund, and consequently consented to a dismissal of the bill as to them, that the bill should have been dismissed as to all. The rule which requires the dismissal of the whole bill, if one, or more, of several co-complainants fail to make out their case, has never, to my knowledge, been applied with any stringency to creditors' bills; and unless a misjoinder of such complainants will affect the propriety of the decree, the objection will not be allowed to prevail in any case, when taken for the first time at the hearing. Newhouse et al. v. Miles, 9 Ala. Rep. 460; Watertown v. Connor, 4 Paige, 510; Story's Eq. Plead. 544; Erwin v. Ferguson, 5 Ala. Rep. 158. On this subject, Mr. Justice Story, in his work on Equity Pleading, uses the following language; "If the court proceeds to a hearing on the merits, the misjoinder will be disregarded, at least if it does not materially affect the propriety of the decree." Story Eq. Pl. 417. Even if the objection of misjoinder of complainants were allowable, in cases like the present, when the bill is both in form and substance a creditors' bill, to which all who claim to be creditors have a right to become parties, though the interest of each, except as to the fund sought to be charged, is separate from, and independent of, that of all others, still, it should be interposed by way of demurrer. But the cases are exceedingly rare, if they exist at all, in which demurrers to creditors' bills will be sustained, for a misjoinder of claimants. There is rarely to be found a creditors' bill, with many complainants, in which some of them have not failed to make out their case, and consequently have been compelled to submit to a dismissal of the bill as to them; but this has never, in any case which has come under my observation, been allowed to affect the rights of those who established their demands to a decree for the sums due thereon.

3. A motion was also made, at the hearing, to suppress the depositions of Henry A. and Phineas Fowlkes, upon the

grounds, as to the former, that he was a party to the bill—was interested in the event of the suit, and because the deposition was taken before George L. Baine, who was interested in the event of the suit, and security on a debt of the first class secured by the deed.

Henry A Fowlkes is the maker of the deed of assignment, and is shown by the proof to be a discharged bankrupt. He can receive nothing under the deed, unless there be a residuum after paying all the debts secured by it, and the discharge of all debts proved against him on his bankruptcy. He was examined by the complainant Redman, to prove the consideration of his claim, and his (Redman's) assent to the terms of the deed within six months after its execution. While it is conceded that a bankrupt is not a competent witness to testify for the assignee for the purpose of increasing the fund in his hands, yet it is clear, both on principle and authority, that if his testimony tends to decrease that fund, he will be regarded as swearing against his own interest, and is competent.

The mere fact that a witness is a party to a suit in Chancery, is no sufficient reason to exclude or suppress his testimony. If he has no interest in that part of the litigation about which he is called to testify; or, if being interested, he is examined as to matters which militate against that interest, as is the case here, he is perfectly competent.

The exception taken to the deposition, because it was taken before Baine as commissioner, if it could be allowed to prevail at all, comes too late when taken for the first time at the hearing. Beattie v. Abercrombie, 18 Ala. Rep. 9. It is one of that class of exceptions which should have been taken, and reserved, at the time of filing the cross-interrogatories to the witnesses. A party will not be allowed to go on, without objection, to examine a witness before a commissioner, and when he finds such examination to result disastrously to his interest, to come at the hearing, and object to the competency of the commissioner to act as such. The motion to suppress the deposition for this cause, was rightly disallowed for another reason. It no where appears, either by proof or admission, that the George L. Baine who acted as commissioner in taking the deposition of the witness, is the same person who is security on one of the notes provided for in

the deed of trust, and the bare identity of name will not, of itself, establish that fact.

It is insisted also, that the deposition of this witness should be suppressed, because there was no affidavit made of his want of interest in the subject-matter of the suit about which he was testifying, before the order was made under which his examination was had. I know of no rule which requires such an affidavit; orders to examine a defendant, in behalf of the complainant, are made as matters of course, reserving the question of his competency to be made at the hearing. 2 Danl. Chy. Prac. 1044. But if there be any irregularity in the terms of such an order, the cross-examining party must make his objection at the time of filing his cross-interrogatories; or, refusing to cross-examine, he may object, upon notice, after publication, but not at the hearing of the cause, except by consent. All objections for mere irregularities come too late, when made, for the first time, at the hearing. Beattie, adm'r, v. Abercrombie et al., supra.

The same authority disposes of the objection that the witness failed to answer fully some of the cross-interrogatories propounded to him.

For these reasons, we are satisfied the Chancellor did not err in refusing the motion to suppress the deposition of Henry A. Fowlkes.

The objections to the deposition of Phineas Fowlkes were two, first; that he was interested in the event of suit; and secondly, that his testimony was taken before Baine, an interested party.

This witness was security to one of the notes provided for in the deed in the same class with that of the complainant Redman, at whose instance he was examined. His interest was antagonistic to that of Redman, and consequently when he deposes in favor of the latter, he swears against his own interest, and is competent.

The second ground of objection is the same as that urged against the admissibility of the deposition of Henry A. Fowlkes, and for the reasons given in this opinion for disallowing it in that case, it must be refused in this.

It appears that portions of these and other depositions were ruled out by the Chancellor. The witnesses, in answering

several interrogatories, state what Redman had told them, in the absence of the other parties in interest. This was illegal testimony, and was rightly ruled out and disregarded by the Chancellor.

4. The proof of Henry A. and Phineas Fowlkes clearly establishes the *bona fides* of the debt of Redman, secured by the deed, which had been impeached by the answer of Colgin. The testimony of the witness Allen, who deposes that Redman was poor and unable, in the opinion of the witness, to advance so large an amount of money to Fowlkes, is, at most, but negative in its character, and cannot break the force of the positive testimony of the Messrs. Fowlkes. Again: several other witnesses prove facts which go far to show that Allen was mistaken, as to Redman's pecuniary condition. Upon the proof, we think, the *bona fides* of Redman's debt is fully made out.

Henry Fowlkes states distinctly and unequivocally, that Redman advanced him money at different times, and in large amounts, which he had never repaid, and that he left in his (Fowlkes') hands a large sum of money to be remitted to Virginia, which he did not remit, but used. Phineas Fowlkes proves that Redman was engaged in negro trading; had several thousand dollars of his own, and control of large amounts of the funds of others. These witnesses had opportunities of knowing his true condition, far superior to those of any others who have been examined, and as they stand without direct impeachment, their truth cannot be successfully called in question.

5. The assent of Redman to the provisions of the deed is proved by Henry A. Fowlkes and the witness Steele. The former says, that Redman was present when it was written, and approved what was done; and the latter deposes, that he went with Redman to one of the trustees, to whom Redman exhibited the evidence of his debt, and distinctly assented to the deed. This was shortly after the deed was written, and before the expiration of six months.

6. The only remaining question relates to the construction of the deed. This divides the creditors of Fowlkes into three classes, but as the money arising from the trust property is insufficient to pay off and discharge those of the first class,

it is needless for us to examine its provisions as to the second and third. The language in relation to the payment of the debts in the deed is this: "They (the trustees) shall pay and satisfy the following debts of the party of the first part, in the following order, to-wit: first class," &c. Here follows a large class of debts composing this class, in which is included that of Redman, and the paragraph concludes: "The above demands compose the first class of creditors, being principally endorsers, securities, and those who advanced money to the said party of the first part, and all are to be first satisfied and discharged in full." The deed then proceeds: "The second class comprises the following claims," &c. It is also provided that these "shall be paid ratably and proportionably, after the entire discharge of the debts in the class first enumerated." The deed then devotes any residuum after the payment of the debts of the first and second classes to the payment of the remaining creditors of the grantor.

The trustee, Colgin, insists, in his answer, that the term "order," as employed in the deed, was intended to be applied to the position assigned to the debts as they are enumerated in the first class; so that those first named should be first paid, and if there was a deficiency of funds, those whose claims were not reached by this method of payment should receive nothing. It is clear to my mind, that when the deed was drawn, both the grantor and Colgin acted under the belief that there would be more than funds enough to pay in full the claims of all the creditors of the first class; and it is equally clear, that they thought there would not be enough to pay in full the debts named in the second class. The idea, then, of a preference among the first class of creditors never for a moment presented itself to them; when a deficiency was apprehended, as in the case of the second class of creditors, and a desire to prefer one creditor over another existed with Fowlkes, the language employed by the draftsman gives expression to this desire in the most unambiguous terms, for the deed provides that two of the claims enumerated in that class shall be paid in full, before payment should be made on the remainder, and then that the funds on hand should "be paid ratably and proportionably" to the other claims of this class.

Our construction of the deed is, that the term "order," as employed by the grantor, was intended to apply to the *classes* mentioned in the deed, and not to the creditors enumerated in the first class; so that, as the funds derived from the property are insufficient to pay all the debts enumerated in the first class, they must be divided ratably among such as have assented to the deed.

Such, upon the several points considered, was the opinion of the Chancellor, and his decree, being in conformity to it, must be affirmed.

PHARIS ET AL. *vs.* LEACHMAN, ADM'R. ET AL.

1. The general rule is, that to entitle a creditor to the assistance of chancery upon an allegation of fraud in his debtor, he must stand as a creditor with a lien, or as one who has exhausted his legal remedies.
2. But this rule does not apply to administrations, in relation to which Courts of Chancery have jurisdiction over estates, in the direction and control of executors and administrators, and in protecting the rights of creditors generally, as well as in decreeing distribution of assets, by virtue of their original powers.
3. The settlement of an administration, which has been commenced in the Orphans' Court, may be withdrawn from that tribunal, and taken into a Court of Chancery, whenever the powers of the former court are inadequate to the exigency, and cannot afford a sufficient remedy.
4. Where a bill is filed by a creditor to pursue certain real and personal property, which is standing in the name of a trustee for the wife and children of the debtor, and which the bill alleges was fraudulently added to their estate by the debtor, and the debtor's estate has been reported insolvent, chancery may take jurisdiction of the case, and withdraw the administration from the Court of Probate.
5. And in such case, the administrator of the debtor is a proper party defendant to the bill.
6. Where the defendants claim the benefit of the statute of non-claim by way of plea, but do not positively deny in their answers the presentation of complainant's demand, proof of presentation by one witness is sufficient.
7. In a suit against an administrator, his admissions of the presentation of the demand are sufficient to take the case out of the statute of non-claim, although such admissions are made after the lapse of eighteen months from the grant of letters of administration.
8. Where the suit is in chancery, for the purpose of subjecting to the payment of the intestate's debts, property which is standing in the name of a trustee for the benefit of his wife and children, and which is alleged to have been purchased

by the intestate with his individual means, and fraudulently added to the trust estate, the admission by the administrator of the presentation of the complainant's demand is evidence, not only against the administrator, but also against the *cestuis que trust.*

9. A payment on a claim, made by the administrator after the lapse of eighteen months from the grant of letters of administration, is a fact tending to establish its due presentation within eighteen months.
10. The report of insolvency made by the administrator after the lapse of eighteen months from the grant of letters, in which he has returned a claim as a subsisting debt against the estate, is evidence of its due presentation.
11. When a statement contained in an answer, of a material fact within the respondent's knowledge, is disproved, the answer loses its weight as evidence.
12. The continuous possession for five years by the husband, of slaves placed in his possession by his father-in-law, is sufficient, unless rebutted by satisfactory proof, to raise the presumption of a gift.
13. Although the borrower may have had the continuous possession of slaves for more than three years, without the registration required by the second section of the statute of frauds, yet if the owner resumes the possession of them before a creditor acquires a lien upon them, they cannot be subjected to the payment of the borrower's debts.
14. A lien lost or destroyed is the same as if it had never existed.
15. Although the trustee's estate, after his death, is responsible to the *cestuis que trust* for the trust funds received by him, yet no lien accrues in their favor upon property purchased by him during his life, when no portion of the trust fund can be traced into such purchase.
16. Where a husband purchases property with his individual means, and takes the title in the name of himself as trustee for his wife and children, such property will be subjected to the payment of his debts, on a deficiency of other assets; and in such case his personal representative must account for the rents and profits of the real property, and the hire of the personal property, from the service of the bill, if necessary to supply the deficiency.
17. Where a receipt, which is given for a claim on a third person, expresses on its face that the claim is to be placed to the credit of a judgment, the presumption is that the claim is received as an absolute payment of the judgment *pro tanto;* and this presumption is not rebutted by proof that such third person was insolvent at the time, and that no portion of the claim could have been collected from him.
18. Where a debtor sells to his judgment creditor, at a stipulated price, certain slaves to which he has no title, with the understanding and agreement that the price is to be credited on the judgment, unless the title should prove bad and the slaves be lost to the creditor, in which event only the hire for the time during which they remained in the creditor's possession was to be credited on the judgment, and the slaves are afterwards recovered from the creditor in an action of trover by the legal owner, together with damages from the time when he acquired them, the debtor is not entitled to a credit for the hire.
19. Where slaves are bequeathed to a married woman and her children, and the will provides that the slaves shall be placed in the hands of a trustee, for her own use and the use of her children, and that no person shall deprive them of the same or any part thereof, and the slaves remain about the house, and in the possession, of the husband and wife and their children, the condition of the trust is fulfilled, and the husband is not accountable for hire.

20. The widow is entitled to the dwelling house in which her husband resided at the time of his death, free of rent, until her dower is assigned. (Clay's Digest, 173, § 7.)

ERROR to the Chancery Court of Greene.

Tried before the Hon. W. W. Mason.

This bill was filed by a creditor of Charles L. Roberts, on behalf of himself and the other creditors of said Roberts, to subject to the payment of his debts certain real and personal property which, it is alleged, was purchased by said Roberts in his lifetime, and the real estate improved, with the individual funds of said Roberts, and the titles taken in the name of a trustee for the use and benefit of his wife and children, who were the *cestuis que trust* of a trust estate created by the will of Woodliff Bevell, the father of Mrs. Roberts. The bill also makes a demand upon a family of slaves, which, it is alleged, were the property of said Roberts by gift to his wife from said Woodliff Bevell, and which are also alleged to have been fraudulently included in the trust estate.

The complainant's demand is based upon two judgments, which he obtained against Roberts in his lifetime, and on which executions had been issued, and returned "no property found," but the executions were not renewed at any time within two years before the death of Roberts. It does not appear that any other proceedings were instituted, by way of having the claims allowed against the estate. The bill charges that the claims were presented to the administrator, within eighteen months after the grant of letters, and that the estate has been reported insolvent by the administrator.

As connected with his demands, the complainant charges that Roberts sold him two slaves, at a stipulated price, which were to go in part payment of the judgments; and upon the further agreement, that if Roberts had not a good title to the slaves, and they were 'ost to the complainant, then the amount stipulated to be paid for them was not to be credited on the judgments, but in such case, the hire of the slaves during the time complainant had them was to be allowed as a credit on the judgments; that a suit was instituted against the complain nt, for the conversion of the slaves, by the trustee of Mrs. Roberts, and damages were recovered to the amount of

their value, and also interest on their estimated value from the day of sale. The bill prays that, in taking an account of what is due upon the judgments, a credit for the hire of the slaves should not be allowed.

The complainant also seeks to avoid a credit on his judgments for a claim on one Wm. M. Inge, which was received by complainant's attorneys from Roberts, and a receipt therefor given, expressing on its face that the amount was to be credited on the judgments. This credit it is insisted should not be allowed, on the ground that said claim was not, as expressed in the receipt, to be taken as an absolute payment, but was only to be credited on the judgments in the event of its collection, and that, on account of the insolvency of Inge, nothing could have been, nor has been, collected on it.

The administrator of Roberts, as such, the trustees and *cestuis que trust*, are made defendants to the bill. The answers of Leachman and Mrs. Roberts admit the complainant's claim, and also the purchases, which are set out in the bill; but they deny that the purchases were made with the individual means of Roberts, and insist that the purchases, as well as the improvements of the real estate, were made with the trust funds, or with money raised upon the faith of the trust funds, and for the benefit of the trust estate. The alleged gift of the slaves by Woodliff Bevell is also denied, and the charges of fraud. The credits, already referred to, are insisted on, and the statute of non-claim is set up, by way of plea, to the complainant's demands.

It is unnecessary here to state the evidence, as upon the facts in controversy it is set out in the opinion of the court. The case was submitted to the chancellor upon the bill, answers, evidence, &c. and a decree was rendered dismissing the bill, upon the ground that the evidence did not establish a presentation of the complainant's demand to the administrator within eighteen months after the grant of letters; and from this decree the complainant prosecutes a writ of error.

J. B. Clarke and R. H. Smith, for plaintiff in error:

I. As to the jurisdiction of the Court of Chancery. In the exercise of its original powers, which remain unimpaired by statutory inhibition, the Courts of Chancery have jurisdiction

over estates, in the direction and control of executors and administrators, and in protecting the rights of creditors, as well as decreeing distribution of the assets. In all cases, where trusts are to be executed, or a discovery of assets is wanted, the powers of the Orphans' Court being inadequate to afford the necessary relief, chancery will take jurisdiction; and courts of equity will not enumerate the cases, in which upon a suggestion of fraud, they will take jurisdiction. Executors and administrators are almost in every respect considered in equity as trustees. Dement v. Boggess, 13 Ala. 143; Horton v. Moseley, 17 ib. 796; Blakey v. Blakey, 9 ib. 394; Leavens v. Butler, 8 Porter, 396; Kennedy v. Kennedy, 2 Ala. 572.

The objection that the complainant is not a *creditor with a lien*, cannot prevail in a case like this, if at all. A creditor with a lien may come into chancery, to remove a cloud on the title, and thus reap the full effect of his lien. A creditor who has reduced his demand to judgment, and had execution returned "no property found," may come into chancery to subject equitable assets. He comes in, not because *he has a lien*, but because he has, by a return of process, shown that there is nothing on which he can get a lien, and because there are *equitable assets*, which may be subjected. His lien, in such case, does not relate to his legal process, but begins from the filing of his bill, and the creditor who first files his bill, has the first lien. Legal process is no lien upon equitable assets. Beck v. Burdett, 1 Paige, 309; Edmondson v. Lyde, ib. 639; 2 Blackf. 356.

The doctrine of a creditor's right to file his bill, to obtain satisfaction of his debt, fruitlessly prosecuted at law, has no application to a party standing in the light of a beneficiary seeking to hold a trustee to account. The former invokes an extraordinary power of the court; the latter, the ordinary, original, inherent power. The doctrine, if applicable to this case, would prove too much; it would show that this property is entirely beyond the reach of creditors. Thus: The administrator cannot touch it, *as administrator*, being bound by the fraud of his intestate; it cannot be reached by *scire facias* against the heirs, for the heirs do not take it *as heirs*, but as *fraudulent purchasers;* without it, the estate is insolvent, and

the creditor can only get a decree for his distributive share of the assets, without any lien, or any process to reach this property.

II. We insist, that the trust property is held by Leachman, under a fraudulent investment by Roberts, not as administrator, but as executor *de son tort.* The bill does not call him executor *de son tort*, but it sets out all the facts necessary to show his liability to account as such, and this is sufficient. There is no form absolutely necessary to a bill in chancery. That the creditors may subject the property, and that the proper remedy is, to hold the fraudulent grantee liable as executor *de son tort*, see Osborne v. Moss, 7 Johns. 161; Roden v. Murphy, 10 Ala. 804; Densler v. Edwards, 5 ib. 31.

The attempt to charge Roberts with hire for the negroes cannot be allowed; in serving the family of Roberts as domestics they were employed strictly in accordance with Mr. Bevell's will.

As to the two slaves sent to Roberts by Mr. Bevell, and remaining in possession, the evidence of Thomas L. Bevell proves them to have been given to Charles Roberts; but even if loaned, Roberts retained them more than three years, and they became liable to his debts under the statute of frauds.

It will avail nothing that no conveyance proceeds from Roberts; it is the same thing that he procures it made, he paying the consideration. It is a fraudulent gift by him to his wife and children, void as to creditors.

It has been said, if this property be subjected, the trust fund should first be raised from it; but it was bought and paid for before the trust fund accrued; again, $2320.87 of this has never been expended, which deducted from $3054, (the whole fund) leaves only $733.13 of it ever expended in any manner by Roberts. But the reverse of the principle contended for is true, if the trust fund partly paid for the property, to wit: that our money (Roberts' money) will be raised from the property. Hoot v. Sorrell, 11 Ala. 386.

III. As to the statute of non-claim. Defendants Leachman and Mrs. Roberts plead statute of non-claim, and answer in effect that they do not believe or remember that the claims were presented. It is not denied but that the admission by the administrator, made within eighteen months from grant of

letters, is good evidence against him of presentation. But it is insisted that such admission made after the eighteen months is inadmissible. By the deposition of Clarke, and by the fact of payments within the eighteen months, the presentation is proven. A payment necessarily comprehends a demand. It is the result, the fruit of a demand, and the judgments may be treated all as one debt, the notes on which they were rendered being parts of the same debt. Admitting, however, that each was a different debt, the payments not being directed in their application, the creditor was left to apply as he pleased, or they will be applied to all equally. It is not to be credited that these payments were made without knowledge or regard as to how, on what, &c., they were to go.

The return of insolvency by the administrator, his payments subsequent to the eighteen months, and after the filing of the bill and service on him, establish the fact of presentation, especially when we remember that his return of insolvency had to set forth the "subsisting debts," the character of the debts, the amount of each, and the residences of the creditors. This return was an official act, under oath; an oath, upon the truth of which, depended the course the whole subsequent administration would take. But it is objected, first, that the admissions of the administrator, made after eighteen months, cannot be given in evidence; and, secondly, that no admissions of his are good against Mrs. Roberts and children, and especially as respects the realty.

The first part of the proposition is erroneously supposed to be sustained by Br. Bank at Decatur v. Hawkins, 12 Ala. 755. In this case the non-presentation was established, and the question was could the bar be removed by a subsequent promise; in the case at bar, the acknowledgment is only used as evidence of a previous presentation, not to revive a claim proven to be barred. The case cited has no analogy therefore to the question presented. None of the cases relied on by the defendant to sustain this position, do sustain it, and discarding the casual remarks of the judges, do not prove it. Gorman v. Nairne, 12 Ala. 338, only holds, that an administrator paying a claim and taking a refunding obligation to repay if it should not be made good, can recover back the money, it being judically decided by the proper forum that

the claim was barred. Thrash v. Sumalt, 5 Ala. 18–21, simply holds, that the statute runs from grant of letters, without regard to publication. Jones' Ex'ors v. Lightfoot, 10 Ala. 24, (in which stronger language is used than in any other case, and from which the court receded in Hallett & Walker v. Branch Bank of Mobile, 12 Ala. 193,) that simply knowledge of the existence of a claim by the representative, is insufficient to save the bar of the statute. Boggs' Adm'r v. Branch Bank at Mobile, 10 Ala. 975, holds a judgment vacated and the suit abandoned, is not sufficient presentation. Hallett & Walker v. Branch Bank at Mobile, 12 Ala. 193, reduces to certainty the hitherto loose expressions, that there must be a presentation or "something equivalent thereto;" determines that notice of non-payment, &c. of a note or bill given by a notary is a good presentation, and that any evidence which will satisfy a jury, will suffice to satisfy the demands of the statute; in this respect, following the ruling of Mississippi, as shown by the authority cited in the opinion.

The personal representative is the person, and the only person, authorized by law to receive presentation. He may mark on a claim "presented," but cannot be compelled to do it. Witnesses to the fact may die or remove, and yet the proposition extends to this, that by no means can you use his admissions, made at any time, against the heirs, and cannot use those made after the lapse of eighteen months against him. This would, by judicial legislation, strip the creditor of the right to a discovery from him, and render nugatory an admission in an answer in chancery.

The admissions, whether made before or after the eighteen months, are not conclusive, but admissible evidence, not only against him, but against all, for whom and in respect to whom he acts, to wit: his successor, the distributees and creditors. He is their trustee as to this, and his acts and admissions are good against them. Starke & Moore v. Keenan's Ex'ors, 5 Ala. 590. This case not only holds that the admissions of the representative are evidence, but that they may be given against his successor, whose office is distinct and separate from his. Lambeth v. Garber, 6 Ala. 870. The case of Bond v. Smith, 8 Ala. 386, relied on by defendant, only holds that the heirs may, when in adverse position to the representative,

invoke the statute of limitation, and does not militate against our position.

But as to the property admitted by Leachman to be in his hands, being administered, he is the only party to litigate; as to the other, there are no heirs or devisees, but fraudulent purchasers. If the trust funds can be reached at all, it must be on the ground of a fraudulent gift to Roberts' wife and children, and it never was the design or policy of the statute to protect such.

IV. They cannot invoke the statute. This will be obvious from a consideration of its nature and design. By its language it begins to run only from the grant of letters; its action extends to matters which, under letters, are to be or may be administered, at farthest only to an estate which may descend. It is the forerunner, if I may so speak, of a close of the administration, its object is to promote that end. It is a mere bar of remedy. Doe ex dem. Duvall's Heirs v. McLoskey, 1 Ala.; Inge et al. v. Boardman, 2 Ala. It applies not only simply to such estate as may be administered, but to one who may administer it under authority of full letters. Erwin v. Branch Bank at Mobile, 14 Ala. 307; Lowe's Ad'mr v. Jones, 15 Ala. 545. It is in short, a statutory bar, which is a mere adjunct to the administration provided by law, arising with, running with, confined to and dependent upon it, and has no more application to an executor *de son tort*, than have the other statutory regulations providing for and directing the administration of estates, such as obtaining orders to sell real estate, reporting the estate insolvent, &c. &c. In this respect it has no analogy to the general statute of limitations, for that is in nowise dependent on the grant of letters.

John A. Campbell and S. F. Hale, *contra:*

1. Has the plaintiff a standing in court? It is admitted that he has done nothing since the death of Roberts to revive his judgments, or to ascertain the value of his legal remedies. The lien upon the land, and of his executions, has been lost by this event. 15 Ala. Rep. 282; 13 ib. 167.

It will be admitted that, as a general rule, a party cannot proceed in equity to subject property conveyed by a debtor upon the allegation of fraud, unless the party has exhausted

his legal remedies. If, from any cause, the right to issue an execution has been lost, he must place himself in a condition to be able to exert that right, before a bill will lie. 1 Barb. Ch. R. 589; 11 S. & M. 366; 12 ib. 547. The question then arises, is there an exception in favor of creditors of decedents? One authority asserts there is, 2 Blackford, 421.

The case, it will be seen, is peculiar. No administration, no personal estate, a *single* parcel of property fraudulently conveyed.

The case which is referred to to sustain the general proposition has no analogy to the case before the court, and does not support that adjudication. The case in 4 John. Ch. R. 619, was the case of a judgment and execution against a surviving partner, without fruit to the creditor; a solvent estate of the deceased partner, and a liability of that estate by contract to hold the surviving partner harmless. It is obvious that there were two distinct grounds for equitable interference; the liability in equity of the deceased partner's separate estate, for the debts of the insolvent partnership, and the express liability arising on the contract of indemnity.

There was also a general jurisdiction in Great Britain over executors and administrators as trustees, and estates might be administered there through the Court of Chancery. This case, then, does not show that creditors without a judgment or the exhaustion of their remedies, can impeach the transactions of the decedent for fraud. Adams on Equity, 257.

The case came before the Court of Appeals in South Carolina, 1 Hill, 297, 301. The principle for which we contend is there plainly admitted. There, the court held that the ascertainment of the debt as a charge upon the estate, in some legal proceeding, was essential. 3 Barb. Ch. R. 427.

The importance of this principle is shown in this case. One of the important issues in this case is, whether the plaintiff has a claim against the estate. This brings us to consider the plea of the defendants. The plaintiff files his bill, to compel the surrender of property by Leachman and the widow and children of Roberts, for the purpose *of the administration* of the estate of Roberts, and to *the benefit* of his creditors. We say, first, that the plaintiff should have had his debt allowed in the Probate Court, before he could commence this proceed-

ing. This point has been discussed, but if that is not conceded, his bill requires him to establish a valid claim upon the assets of Roberts. He must be a creditor with *a lien* on the estate, fully ascertained, before he can impeach the acts of Roberts. 13 Ala. Rep. 167, before cited.

The question then is, is there a valid claim? Leachman has pleaded the statute of non-claim, which, if true, must exclude the plaintiff from any share of the fund. The question is, has this plea been disproved. The only witness who seeks to disprove this plea is the *attorney* of the plaintiff.

The admission of Leachman, after the expiration of eighteen months, would not be evidence against the widow and children of Roberts. 2 Barr 112; 1 Russ. & M. 347; 5 Pickering Rep. 139; 4 Har. & J. 270. After the eighteen months have expired, the authority of an executor or administrator to make admissions *unfavorable* to the heir, has terminated; all claims not then presented are barred by the express language of the act. To allow the administrator by an admission, after that time, to affect the estate, would superinduce fraud and collusion. An agent's admission after his authority has terminated, or otherwise than in the current course of business, is inadmissible. The admission of a partner after the dissolution of the partnership, does not bind. So, after the power to receive claims under the statute of non-claim has expired, the executor or administrator has no power to make an admission which will bind any other party in interest.

In this point of view, then, the evidence of Clark would not only be insufficient, but be inadmissible. In no event could it countervail the direct denial of the answers.

The other ground relied on, is the payment by Leachman to Murphy & Jones of a part of the debt, before the expiration of the eighteen months. A part payment will take a case from the operation of the statute of limitations, and is evidence of a *waiver* of notice of non-payment of a note.

Neither of these cases, however, is analagous to the statute of *non-claim*. That statute is an *imperative* statute, imposing a condition upon the creditor without which his claim against the estate of a decedent is barred. Its provisions were designed to secure all persons interested in the estate, and they cannot be *waived* or nullified by the act of any one

party in interest. The statute admits of no substitute for its requirements. They are plain and direct, and must be literally pursued. The act of Mississippi has been construed to be a statute of limitations. We have resolutely refused to adopt that construction, or to impair the vigor and energy of the statute. 10 Ala. Rep. 17; 12 ib. 193; 8 ib. 454; 15 Mass. 122, 264.

Such being, then, the legal effect of the pleading and evidence, it is apparent the plaintiff has not made a case which entitles him as a *general creditor* to come into chancery, even though the court should hold that a *general* creditor could do so. But we apprehend, that when the cases are considered, it will be found that such a general creditor could not file a bill of this description. 8 Ala. Rep. 866; 12 ib. 499.

The question now arises, can the plaintiff recover upon the case made by the bill? It will be seen there is no averment of the insolvency of the administrator or his sureties. 16 Ala. Rep. 548. If Leachman has failed in his duty as administrator, he is liable as such. He is entitled, in the first instance, to pass upon the rights of the *estate*, and his judgment cannot be overruled or annulled, except by proof of fraud and collusion, and upon an allegation of malfeasance and insolvency, sustained by proof.

The demand upon the trust property consists of a claim for the slaves Abby and her children, who were sent with Roberts to Erie, in 1832. Three witnesses testify upon the subject of the original transaction. These are the children of Woodliffe Beville. Two of these children sustain the strong and direct averments of the answer of Mrs. Roberts. This answer is in direct response to the allegations of the bill, and the demand for discovery contained in the interrogatories. The *answer* is of facts within the knowledge of the party answering, and there is no witness to contradict it. The evidence of Richard Roberts is express, that in 1837 they went into the control of Thomas L. Beville, as a part of the estate. In 1839, in February, they were divided as a part of Woodliff Beville's estate.

The witness before mentioned speaks of continued absences, at the pleasure of Woodliff Beville.

It is also in proof, that Roberts, at the time of his marriage,

was poor and in debt. The facts of possession and control, testified to by other witnesses, are harmonious with this testimony. Every slave on one's plantation must be held and treated as such. The white man in possession must act as a master; and the nature of the right to a slave can never be inferred from the quality of the acts of control and ownership that may be exercised over him.

We find that possession was interrupted frequently, and the quality of the title permanently declared in 1837, with the assent of Roberts.

The plaintiff can claim nothing by the statute of frauds. All the *liens* of the plaintiff expired with his executions returned "no property found," and the failure to renew them. The permanent return of the possession of the slaves, in harmony with the title of Woodliff Beville, and in contradiction to any apparent right of Roberts, had taken place long before the death of Roberts, and was held at a time under that title when no lien of the creditors existed. The construction of the statute of frauds has very properly been made by the Supreme Court. That construction is, that the *property remains with the title, and not with the possession;* unless three years of continuous and undisturbed possession has remained with the debtor prior to the existence and enforcement of a lien created by the law. If the lien is destroyed, or is not pursued, the owner of the property may resume the possession, and will be protected in the property. 12 Ala. Rep. 499; 17 Ala. Rep. 280.

This statute is in a high degree favorable to creditors, and penal upon the rights of holders of property under a *bona fide* title. It confiscates the *right* in favor of a creditor, upon a very doubtful conclusion that he may have been injured by equivocal evidence of title permitted to his debtor. The court certainly should not extend the statute to cases not clearly within it. In this case, the proof strongly indicates that the plaintiff could not have been imposed on by such *indicia.*

The other items consist of the purchase of lands of Foster, and the exchanges and improvements on Gullett's land and certain slaves of Giles.

The plaintiff has no right to treat these purchases as prop-

erty of Roberts. The only claim would be in favor of the estate of Roberts, upon the trustee, for moneys advanced for it.

Before the plaintiff could be entitled to claim this amount, he should have established his right in the Probate Court, or by a revivor of his suits, and then he might have been in a condition to sue.

The plaintiff has no right to enjoin the proceedings in the courts of Sumter county. It is apparent that a trustee cannot sell the slaves of the *estate* to pay his own debt. The sale then to the plaintiff was voidable by the *cestuis que* trust. Nor have the creditors at large, who are parties in common with Pharis, an interest to stop the proceedings. The claim is an individual claim of the trust estate upon Pharis, a *mala fide* holder of property belonging to it.

Neither have the creditors any equity to interrupt the proceedings of Gullett. Gullett made a fair exchange of property with the trustee, and the *cestuis que* trust are willing to affirm it. On the part of Gullett, the contract has been executed. He is entitled to the land, and the creditors have no lien or right to hinder the fulfilment of the contract. In conclusion, we insist, 1st. that the plaintiff is not entitled to file this bill; 2d. that the case made by it is not one entitled to relief; 3d. that the debt of the plaintiff, as a valid and subsisting debt, has not been established.

GOLDTHWAITE, J.—The bill is filed by a creditor of Charles L. Roberts, on behalf of himself and other creditors, to obtain administration of the legal assets of the estate, and also to subject to the payment of the debts of the estate, certain real and personal property, which, it is alleged, have been fraudulently added to the trust property of the widow and children. The complainant is not a creditor with a lien ; but the bill shows a judgment against the intestate, an execution and return of "no property" during his life, and a report of insolvency by his administrator. The administrator of Roberts, who is also the trustee, and the widow and children, who are the *cestuis que trust*, are with, others, made defendants to the bill.

The first question presented in the argument is, as to the

right of the complainant, upon the case made by his bill, to come into a court of equity. It may be conceded, that ordinarily a creditor, to entitle himself to the assistance of the Court of Chancery upon an allegation of fraud in the debtor, must stand as a creditor with a lien, in which case the obstacle which prevents its enforcement will be removed, and the path left clear; (Planter's & Merchant's Bank v. Walker, 7 Ala. 928; Dargan v. Waring, 11 Ala. 988;) or as one who has exhausted his legal remedies, without being able to obtain satisfaction of his debt, the end which it was the object of those remedies to accomplish. Hadden v. Spadder, 20 John. 554; Beck v. Burdet, 1 Paige, 368; Roper v. McCook, 7 Ala. 319.

In the one case, a judgment binding the realty, or the issue and delivery to the officer of an execution binding the personal property, must be shown; and in the other, the prosecution of the debt to judgment, issue of execution and return of no property. The application of these rules, however, belongs to the relation of debtor and creditor *purely*, and while this relation exists in the present case, it is found in connection with other circumstances, which are of themselves sufficient to authorize the interposition of a Court of Chancery. In other words, the creditor in the present case asserts his right to the aid of that court, not merely because he is a creditor, but for the additional reason, that his claim is connected with matters of administration which render the interference of Chancery indespensable. The equity of the complainant, therefore, depends upon considerations applicable to the jurisdiction of Chancery in relation to administrations, rather than those which apply to the simple relation of debtor and creditor.

Upon this branch of Chancery jurisdiction, while we incline to the opinion that it would be necessary to reduce to judgment a claim sounding in damages merely, it is certainly true that in England, for upwards of a century, creditors without a lien, without even having obtained a judgment, have maintained their bills against executors and administrators, for discovery and account of assets, and satisfaction of their debts. Joseph v. Mott, Pre. in Ch. 77; Davison v. The Earl of Oxford, 3 P. Williams 401; In the matter of Sir Charles Cox, 3 P. Williams, 341. In this State we do not find that

the point here raised has been expressly decided; but the jurisdiction of equity over executors and administrators, for the protection of creditors, upon considerations which apply with the same force to general creditors, as to those with a lien, or those who have exhausted their legal remedies, has frequently been sustained. Thus, in Kennedy v. Kennedy, 2 Ala. 572, the jurisdiction of equity, in compelling executors to apply the property of their testator to the payment of debts and legacies, is based upon their character as trustees in that court. In Blakey v. Blakey, 9 Ala. 394, the jurisdiction is rested upon the double ground of the fiduciary relation of administrators, and the inadequacy of the powers of the Orphans' Court to afford a discovery of assets. In Dement v. Boggess, 13 Ala. 143, the court asserts, as a clear legal proposition, that courts of Chancery have jurisdiction over estates in the direction and control of executors and administrators, and in protecting the rights of creditors, as well as decreeing distribution of assets, by virtue of its original powers, which remain unimpaired by statutory inhibition. Again: in Hunley v. Mosely, 17 Ala. 796, Mr. Justice Parsons, in delivering the opinion of the court, says: "It therefore follows that a court of equity may restrain the Orphans' Court, from proceeding to a final settlement, when it is necessary that matters purely of equitable cognizance should be adjudicated and ascertained, in order to reach the end of justice."

The principle to be extracted from the decisions to which we have referred is, that the jurisdiction of courts of equity in matters of administration, in relation to the enforcement of claims of creditors and the distribution of assets, is sustained upon considerations essentially distinct from those which influence such courts in affording assistance to creditors whose demands are not connected with administrations. In the one case the jurisdiction is original and primary, resting upon its general powers in relation to the settlement of estates; in the other, it is ancillary, or in aid of the legal tribunals whose powers are found inadequate to the emergency.

A Court of Chancery having jurisdiction of the subject matter, it remains only, as to the question now under consideration, to inquire whether the facts disclosed by the bill, are sufficient to authorize the withdrawal of the administration

from a court of concurrent jurisdiction, in which the proceedings have been commenced; and this point also we consider determined by our own adjudications. Whenever the powers of the Orphans' Court are inadequate to the exigency, and cannot afford a sufficient remedy, resort may be had to a court of Chancery: Leavins v. Butler, 8 Por. 381; Scott v. Abercrombie, 14 Ala. 270; Dement v. Boggess, *supra*. Here the bill in effect charges the deficiency of legal assets to satisfy the complainant's demand, and seeks to supply the deficiency out of property, which, it is alleged, has been fraudulently placed by the intestate under cover of the trust. The Orphans' Court can deal only with the rightful administrator as such, and Leachman as the personal representative cannot administer the property, the title to which is in him, as trustee, being bound by the fraud of his intestate, (Rochelle v. Harrison, 8 Por. 352; Densler v. Edwards, 5 Ala. 81; Dearman v. Radcliff, ib. 82; Roden v. Murphy, 10 Ala. 804;) although the estate has been declared insolvent, (Marler v. Marler, 6 Ala. 367.) If the legal assets are insufficient, and the rightful administrator as such cannot administer the property subject to the claims of creditors, and fraudulently held, it follows, that the Court of Chancery is the only forum in which relief can be obtained, and the allegation of these facts is sufficient to withdraw the proceedings from a court whose powers are inadequate to the exigency. Neither do we entertain any doubt, that the administrator of the intestate, as such, was properly made a party to the bill, the object of which was, to reach property which could only be made subject to the payment of the debts of the intestate upon a deficiency of assets, which can be ascertained in no other mode than by taking an account with the personal representative.

In relation to the statute of non-claim: The bill alleges the presentation of the claims of the complainant within eighteen months after the grant of letters, and although the benefit of the statute is claimed by the defendants Leachman and Sarah Roberts, by way of plea, the answers do not positively deny the presentation, although the answer of the former avers that if such was the case it has escaped his recollection. Under these circumstances, proof of the fact by one witness is sufficient. Heartt v. Corning, 3 Paige 566. One witness

swears to the admissions of the administator, that the claims were presented in due time; but these admissions were made after the eighteen months had expired, and it is insisted that the fact in issue cannot be established by admissions of this character. The rule of the English authorities, founded on the case of Bauerman v. Radenius, that the admissions of the party to the record are in all cases receivable in evidence, is not generally recognized as law to its full extent in the American courts, (Cow. & Hill's Notes to Phillips' Ev. 163, and cases there cited;) and in this State it has been repeatedly held, that the admissions of a merely nominal plaintiff, made at a time when he had no real interest, were inadmissible to charge the party actually in interest. Chisholm v. Newton & Wiley, 1 Ala. 371; Copeland & Lane v. Clarke, 2 Ala. 388; Brown v. Foster, 4 Ala 282; Head v. Shaver & Adams, 9 Ala. 793. The case of an executor or administrator is, however, different from that of a naked trustee, and although he will not be allowed by his act or admission to create a claim against the estate, yet the rule established in this, as well as several of the other States, is, that he may by his promise or admission revive one already created, although such promise has the effect of charging the estate. Newhouse v. Redfield, 7 Ala. 598; Hall, Weeks & Co. v. Darrington, 9 Ala. 502; Forsyth v. Ganson, 5 Wen. 558; McIntire v. Morris, 14 Wen. 90; Manson v. Felton, 13 Pick. 206; Farmer v. Gray, 21 Pick. 245. While we are not fully satisfied with the decisions referred to, we do not feel ourselves at liberty to depart from them; and although the statute of non-claim is not a statute of limitations, and the bar created by it cannot be removed by a subsequent promise, (Branch Bank of Decatur v Hawkins, 12 Ala. 755,) yet the principles which govern the two statutes are in some respects analogous. It would be a strange anomaly, to hold that an admission by the personal representative in relation to the claim itself, of which he might know nothing, would be received as evidence to charge the estate in his hands, and yet hold that the admissions of the same party, not in relation to a claim against the estate, but as to an act entirely personal, and attached to him solely in his representative character, could not be received as evidence of such act. We are therefore of the opinion, that the

admissions of the administrator, Leachman, made by him during the continuance of his representative character, although after the expiration of the eighteen months from the grant of letters, are evidence of the fact of presentation; and if they are to be regarded as evidence of this fact against the administrator, they are equally evidence of the same fact against the other parties. The admissions of the personal representative which will take the debt out of the statute do not bind the heir, for the reason that the one represents the personal, and the other the real estate, and the admission of the administrator, operating only on the estate which he represents, is as to the heir an act *inter alios*. But in relation to the presentation of claims, the administrator represents the whole estate.

As to the weight of this evidence, we may remark, that the fact to be proved is not of a character that requires any high degree of proof to satisfy the mind. The witness swears positively to the admission of the administrator, and although he was evidently mistaken in the time when the conversation took place, an immaterial fact, it is highly improbable that he could have been so, as to the character or extent of the admissions themselves, which under the circumstances cannot be regarded as loose or casual. The testimony of this witness is corroborated, by the payments which are admitted to have been made by the administrator to the complainant, both before and after the termination of the eighteen months, as well as by his return on oath after that period, of the judgments as existing debts against the estate. The presumption arising from the payment is, that the person paying has made the payment correctly—that he has inquired into, and is satisfied with the title of the receiver; and the fact of the payment is therefore evidence of the right of the receiver. James v. Biou, 2 Sim. & Stu. 600; 1 E. C. Ch. R. 608. It was the duty of the administrator not to have paid any debt which the statute of non-claim had barred. It was his duty, in the report of insolvency not to have included any such claim as an existing debt against the estate, and the presumption is, that in these respects he has discharged his duty. We regard the evidence as to the due presentation of the claims as sufficient.

We come now to the real merits of the case. The bill

makes a demand upon a family of slaves known as Lucy and her children, on the ground that, although included in the trust deed, they were in reality the individual property of the intestate, derived by gift from his father-in-law, Woodliff Beville. The answer of Mrs. Roberts denies the gift; but upon this point it is entitled to no weight, as the statement she makes as of her own knowledge, that these slaves were taken from the possession of her husband by her father, and retained in possession by him for a year immediately preceding his death, is not only disproved by the evidence of Thomas L. Beville, Hall and Edgeworth, but also by her own witness, Richard Roberts; and the rule is, that an answer disproved in a material statement loses its weight as evidence. Geiger v. Hall, 1 Call, 191. Neither do we attach any importance to the testimony in relation to the occasional absence of these slaves at Woodliff Beville's; it is entirely too loose and uncertain to base any conclusion upon, and the continuous possession for five years by the intestate is sufficient, unless rebutted by satisfactory proof, to raise the presumption of a gift. Olds v. Powell, 7 Ala. 652; Hooie v. Harrison, 11 Ala. 499; Merriweather v. Eames, 17 Ala. 330. The limited circumstances, however, of Roberts at the time he received the possession of these slaves, are sufficiently established; and it also appears from the depositions of two of the complainant's witnesses, Murphy and Robinson, that about the same time he was reputed to have failed in business, and the latter states that he believes the fact of his embarrassments was generally known about Erie, the place where he then resided. Under these circumstances, it is not probable that a man of ordinary prudence, having a just regard for the interests of his daughter, would confer the absolute title of slaves intended for her benefit, upon her husband. The testimony of Mrs. Brooks and Mrs. Beville is positive and circumstantial, as to the slaves going into the possession of Roberts as a loan; that his failure in Madison county was at the time assigned by the owner as the reason for making this disposition of them, and that the other members of the family were called upon as witnesses to the arrangement. These are family witnesses, it is true, but the facts deposed to by them are in accordance with the motives which ordinarily

regulate human conduct under similar circumstances, and in all respects consistent with the subsequent acts of Woodliff Beville. Without attempting to reconcile the testimony of these witnesses with that of Thomas L. Beville upon the same point, or discriminating as to the position they respectively occupy to the parties in interest, it is sufficient to observe that, under all the circumstances, we consider the evidence as sufficient to establish the fact, that the slaves referred to went into the possession of the intestate Roberts as a loan, and not as a gift: and this fact being established, we see nothing in the continuous possession of Roberts, in the will of Woodliff Beville, or in the conduct of any of the parties to the transaction, which would authorize us to infer that the intention of the lender, as declared at the time of the delivery of the possession, was subsequently changed.

Neither can the complainant in relation to these slaves derive any assistance from the second section of the statute of frauds, in relation to non-registered loans. Clay's Dig. 254, § 2. The law upon the clause referred to of that statute, as settled by this court, is, that if the owner resumes the possession of the property before the creditor enforces his lien upon it, it cannot afterwards be made subject to the debts of the borrower. Maull v. Hays, 12 Ala. 199: McCoy v. Odom, 20 Ala. A lien lost or destroyed is the same as if it had never existed, (Otey v. Moore, 17 Ala. 280;) and the executor of the lender having taken possession of the slaves before the creditor had enforced his lien, it is the same in legal effect as if the lender himself had resumed the possession of the property: and the creditor having failed to fasten his claim upon the property, during the existence of his lien, cannot afterwards assert it against the same property when in a different condition. Even if the slaves did not go into the possession of the executor, their appropriation and possession under the will of Woodliff Beville, would be sufficient to prevent the creditor from subjecting the property, after the loss or destruction of his lien. McCoy v. Odom, supra. As to these slaves, therefore, the demand of the complainant cannot be sustained.

In relation to the eighty acres of land which was purchased from Foster, the answers admit the purchase, but deny that

the consideration was paid to the vendor before the intestate received any portion of the trust funds; but upon these points insist, that the purchase was made for the benefit of Mrs. Roberts, and the land paid for in part with the trust funds, and in part with money raised on the credit of the trust funds; and as to the improvements on this tract, the answers also insist, that they were made by the trust slaves in the possession of Roberts, with the exception of some carpenter's work, which was paid for out of the trust funds. The evidence, however, shows that the last installment of the purchase money for this land was paid by Roberts, about the time it fell due in January, 1841, and that he did not receive any payment from the trust funds until the 20th of December in the same year. In the absence of any other testimony, this is conclusive to establish the charge in the bill, that this land was purchased with the individual funds of Roberts. So also in relation to the improvements on this tract, the evidence shows conclusively, from the different estimates placed upon them by the different witnesses who have been examined as to their value, that they were worth from six hundred to a thousand dollars, and that they were paid for by Roberts before he received any portion of the trust funds. The slaves Moses, Betsy and Perry, for which eight hundred and fifty dollars were paid, and the purchase made on the 14th July, 1841, are similarly situated; and the lot No. 91, exchanged for one-half of the eighty acre tract, of course occupies the same position as the land for which it was exchanged.

As regards the improvements which were made on the lot purchased on the 14th July, 1841, the answer insists that they amounted but to five hundred and ninety dollars, and that these improvements were also paid for out of the trust funds. The evidence however shows very clearly, that they could not have cost less than one thousand dollars, and that of the amount expended upon them the greater portion was paid out of the individual funds of the intestate, and the purchase of the lot having been made from the same source, and no portion of the trust funds traced into the lands or the improvements, no lien can result in favor of the trust estate, although the estate of the trustee will be responsible for the

deficiency, as for other debts. Vernon v. Vawdry, 2 Atk. 119; Cox v. Bateman, 2 Vesey, 19.

The correctness of the conclusions to which we have arrived upon the evidence, may be tested by a condensed view of the transactions to which we have referred. The total amount expended by Roberts for the eighty acre tract, the lot on Province street, and all the improvements, with the slaves Moses, Betsy and Perry, according to the evidence, amounted to near seven thousand dollars, and it is also proved that, during these expenditures, he received but a little over eleven hundred dollars from the trust funds. Nothing whatever is shown to have been realized from the trust slaves; no loans contracted, or money raised in anticipation of, or on the credit of the trust funds; and indeed no attempt whatever made to account for the enormous disproportion between the amount shown to have been invested, and the actual amount received. The conclusion therefore, that these investments were made with the individual funds of the intestate, is irresistible; and upon the deficiency of the legal assets of his estate, they must be applied to the demands of his creditors, as also the hire, rents and profits arising therefrom, to be computed from the service of the bill. Backhouse v. Jetts, 1 Brock. 500.

In taking an account of what is due to the complainant, a material question arises, as to whether his demand is to be credited with the claim upon William Inge, which the evidence shows has been wholly lost. The receipt for this claim is given by the attorneys for the complainant, and states upon its face that it is to be credited on the judgments of the complainants against Roberts. No objection is raised as to the authority of the agents; but it is insisted that this credit should not be allowed, for the reason that it was not intended by the parties to have been received as an absolute payment, and has not and could not have been collected at any time since its receipt on account of the insolvency of Inge. By the terms of the receipt it was received as an absolute payment, and although instruments of this character are open to explanation, we do not regard the evidence of the only witness who has been examined upon this point, as sufficient to repel the presumption created by the language of the receipt.

He has no recollection as to whether it was received as an absolute payment, but deduces his conclusion that it was not from the fact that he had never received any instructions from his principal to take it as such, and from the insolvency of the person against whom the claim existed. Evidence of this character is not sufficient to outweigh the terms of the receipt, and this credit must be allowed.

Another question which will also arise in taking the account is, as to the credit claimed on the judgment of the complainant from the hire of the slaves Esther and Martha, from the 14th July, 1842, the time of the sale, to the rendition of the judgment for their conversion at the suit of the trustee. These slaves were trust property; the sale of them by Roberts was without authority, and a note given for the purchase money could, after the recovery against the purchaser, have been successfully defended. So also, the agreement to credit the hire upon the individual debt of Roberts was without consideration, and it would be contrary to equity to enforce it in favor of one who has no claim to the allowance, the purchaser having been charged, as in this case it appears from the evidence, with damages from the date of the transfer.

In relation to the claim which is advanced for the hire of the trust slaves, the general rule laid down by the counsel for the defendant in error is unquestionably the correct one. The father is bound to provide for the maintenance and support of his children, and it is not allowed, as a matter of course, out of their own property. 2 Story's Eq. § 1354 *a*; 1 Rop. Leg. 758. It is, however, equally true, that if the instrument creating the trust gives to the father this benefit, he is entitled to the advantage of it. Thompson v. Griffin, 1 Craig & Phil. 317. The question, therefore, here becomes one of intention, and construction upon the will of Woodliff Beville; and by the terms of that instrument it is provided, "that the slaves that will be coming to Sarah Roberts, are to be placed in the hands of a trustee, to manage the same for her own use and the use of her children, and that no person is to deprive the said Sarah and her children of the use of the same or any part thereof;" and in another part of the same instrument the testator adds, "All the property which I have given to my daughters is for their own use, and not to be taken

from them by any person or persons whatsoever." The intention of the testator to be ascertained from these clauses we think was, that the daughter, Sarah Roberts, and her children were entitled to the use and possession of the trust slaves against all persons; and if this be the correct construction, it follows necessarily, that during the time they so enjoyed the possession the conditions of the trust would be fulfilled. The evidence upon this point is, that these slaves were employed about the house, and the record furnishes no testimony that any of them were hired out, or that Mrs. Roberts and her children had not the use of them at all times.

It is also urged, that by the statute of this State, Clay's Dig. 173, § 7, the widow is entitled to the dwelling house in which her husband resided at the time of his death, free from rent, until her dower is assigned. This position is correct, (Inge v. Murphy, 14 Ala. 289; Shelton v. Carrol, 16 Ala. 148,) and in taking the account of the rents and profits of the real estate, the profits of the dwelling and premises occupied by Roberts at the time of his death must not be computed.

This disposes of all the points which legitimately arise in the case. The decree in the court below must be reversed, the costs in this court to be paid by the administrator, Leachman, and allowed as a claim against the estate of his intestate. The decree to be rendered should refer it to the master: First, To take and state an account of what may be due to the complainant upon his demands as stated in the bill, and such other creditors of the estate as shall come before the master upon reasonable notice, prove their demands, and contribute to the expenses of this suit their just proportion, to be settled by the master;

Secondly, To take and state an account of the assets in the hands of Leachman, as administrator, which must, under the direction of the master, be applied to the debts and other charges against the estate, in the due course of administration according to the laws of this State;

Further, That the west half of the east half of the north-west quarter of section eleven, township twenty-one, and range two east, as divided by a line running north and south through said east half of said north-west quarter, and the other lands described in the bill, and the slaves Moses, Betsey and

Perry, if the assets in the hands of said Leachman, as administrator, are insufficient to pay the debts of the estate in the due course of administration, be decreed subject to supply the deficiency of the debts proved before the master; and that a receiver be appointed, to take into possession all of such real estate, except the premises in the possession of the said Roberts at the time of his death, and hire and rent out the same under the direction of the master, and to receive the rents and profits and hire of the same, under the direction of the master, first giving security to be approved by him.

In case of a deficiency of assets in the hands of the said Leachman, as administrator, after a due administration of the same, and paying the charges and expenses thereof, to pay the debts proved on the account before the master, such deficiency must be raised from the hire, rents and profits of the slaves and real estate in the hands of the receiver, and from the sale of said slaves and real estate, as also the sale of the other lot in Eutaw as described in the bill; such sale to be made under the direction of the master.

If the hire, rents and profits in the hands of the receiver, and the sale of said slaves and real estate are not sufficient to pay said debts, the master must take and state an account with the said Leachman, of the hire of said slaves, and rents and profits of said real estate from the service of the bill upon him, not computing the rents, &c., of the premises in the possession of said Roberts at the time of his death, and that said Leachman be decreed to pay the amount due on such account to the demand of the complainant and the other debts against the estate proven before the master.

BRYAN *vs.* WARE ET AL.

1. Where there is no conflict in the testimony, the court may, on the request of either party, charge the jury that, if they believe the evidence, they must find for that party.
2. Where an account which is barred by the statute of limitations is sent through the Post Office by the creditor to his debtor, at the request of the latter, who

does not respond to the letter for several years, nor make any objection to the account, it does not thereby become a *stated account*, so as to revive the debt and remove the bar of the statute of limitations.

3. To remove the bar of the statute of limitations, and revive a debt, requires either an express promise to pay, or a clear and distinct admission of a present or existing indebtedness.

Error to the Circuit Court of Montgomery.

Tried before the Hon. George Goldthwaite.

This was an action of assumpsit, brought by Bryan against Ware and others, survivors of S. M. Haggerty & Co., for services as an agent and attorney in procuring patents for Indian lands. These services were rendered in the years 1838, '39 and '40, and this suit was not brought until April, 1850. The defendants relied on the statute of limitations, and the plaintiff replied a subsequent promise.

The proof touching this point was as follows, as set out in the bill of exceptions:

"Plaintiff proved by Francis Bugbee, Esq., that on the 8th of June, 1847, he was authorized by Robt. J. Ware, one of the defendants, and a member of the company, to write a letter to the plaintiff and one Thomas J. Abbott, and that pursuant to said authority he did write a letter of that date to plaintiff and said Abbott. The following is a copy of said letter, which was produced and proven, viz:

"'The letter of Mr. Bryan was shown to Dr. Ware, and he requests me to say, that he has never received any letter from either of you to which he has not replied; that there was a division of all the funds of S. M. Haggerty & Co. made some years ago, and that nothing was left in his hands; that there are still some lands unsold belonging to S. M. H. & Co., and that from the proceeds of such lands, when sold, he desires the payment of all outstanding claims and demands, and for the purpose of ascertaining what these demands are, he desires both of you to forward to him your accounts; that he has paid Maj. Abbott considerable sums, and does not know what further demands there may be. He is anxious to have all old matters relative to Indian lands adjusted and settled as early as practicable. Very respectfully, &c.

(Signed) 'F. BUGBEE.'"

The defendants introduced evidence tending to show a payment by them to plaintiff of $100 in 1839, and $300 in 1840, on account of his said services.

Defendants also proved, and introduced as evidence, a letter from plaintiff to said Ware, in the words and figures following, to wit:

"WASHINGTON CITY, June 19th, 1847.

"Dr. ROBERT J. WARE, Montgomery, Ala.:

"*Dr. Sir*—I wrote to Mr. Bugbee two days ago, informing him that both Maj. Abbott and myself had answered the interrogatories sent on in the case of Haden against you, in relation to the reserve of Cowe Hadjo. In Mr. Bugbee's letter enclosing the interrogatories he remarked, that you desired both Maj. Abbott and myself to send our accounts against S. M. Haggerty & Co. My account is as follows:

21 cases patents to S. M. H. & Co., at $50 each....	$1050	00
7 " " to S. M. H. & Co., and J. C. W. & Co., $25.....	175	00
1 " Cowe Hadjo.....	25	00
	$1,250	00

"Maj. Abbott says he will also send a statement of his account.

"In relation to the charges, I have to state, that when I was employed separately, I have never charged in any case when I contended with Watson, less than $100, when I succeeded in obtaining the patent. But as both Maj. A. and myself attended to these claims, I have charged but half the usual fee. I suppose that his charge will be the same. Iverson made the same charges against Watson & Co., as I am informed by Mr. Hanrick. I am exceedingly anxious that the matter should be settled, and settled, too, to your satisfaction. If, therefore, you should think the charge too high, please give me your views, and they shall meet with proper consideration. Do let me hear from you.

"Very truly yr. friend,

(Signed) "JOS. BRYAN."

There was no evidence that said Ware had ever replied to said letter in any way, or had ever objected to said account as rendered in said letter. This was all the evidence in the case relating to the statute of limitations.

The counsel for defendants requested the court to charge, that notwithstanding they might believe all the evidence in the cause to be true, yet they must find for the defendants, on the ground that plaintiff's demand was barred by the statute of limitations. This charge the court gave, and the plaintiff excepted, and took a non-suit, agreeably to the statute.

The charge of the court given as aforesaid, is now assigned for error.

WATTS, JUDGE & JACKSON, for plaintiff in error.

J. E. BELSER, *contra:*

1. The action was commenced on the 12th April, 1850. The services sued for were performed by plaintiff in 1838, 1839 and 1840. The defendants in 1839 paid $100, and in 1840 $300 on account of said services. The statute of limitations was interposed to bar the recovery. All the evidence on this plea is in the bill of exceptions. The court did not invade the province of the jury. The charge asked for amounted to a demurrer to the evidence. Sims v. Sims, 2 Ala. 117; Deshler v. Cabiness, 10 ib. 959; 12 ib. 520; Townes et al. v. Ferguson, at January Term.

2. The letter written by Bugbee for Ware, on the 8th June, 1847, contains no such language as would revive a debt already barred by the statute of limitations. It is worded in the most cautious terms, and was intended not to get plaintiff's account alone, but also Abbott's, to whom it asserts large payments had been made by defendants for services sued for. Besides, if a promise to pay at all, it was *to pay out of certain lands when sold*, and the plaintiff on the trial failed to prove that these lands were sold. Where there is a conditional promise, the plaintiff must show that the condition has been performed. 9 Ala. 320; 6 ib. 776; 8 Porter, 213.

3. The letter of plaintiff to Ware, of 19th June, 1847, and which is relied on to defeat the plea of the statute of limitations, must be construed with reference to Ware's letter of the 8th June, 1847. The circumstances attending the said letter may make it a stated account, and still a stated account may be barred by the statute of limitations, without such a promise in connection with it as would revive a debt already

barred. 6 Ala. 518; 1 ib. 488; 11 Wheaton, 314; 10 Ala. 18; Townes et al. v. Ferguson, at January Term, by Justice Phelan.

4. The cases cited by the plaintiff's counsel fall far short, on this point, of the case at bar. Besides, they contain, in most instances, admissions made before the statute had completed the bar, and the admissions are stronger. 4 Porter, 223: 10 Ala. 959; 11 ib. 137; 3 ib. 600; 22 Pick. 291.

The mere statement of an account to facilitate investigation, is not a revival of a demand barred by the statute, and Ware's letter, written by Bugbee, was only intended to facilitate investigation. 8 Porter, 213.

5. Query: Even if Ware promised to pay after the debt was barred, does a promise by him, when sued as a partner, bind the partnership, or even Ware individually, more especially when the promise is a conditional one, as shown in this instance? And it will be observed, that the suit is not brought against Ware on the promise, but against him with others as partners. It would seem that, from the reasoning in the following case as to plaintiffs, the same principle would apply as to defendants. 16 Ala. 448.

6. Ware, in his letter written by Bugbee, seemed to have not only the account of plaintiff, but also the account of Abbott, whom he treated as jointly concerned with plaintiff, and to whom he had made, as he says, large payments. Suppose Abbott had presented his account, and it had shown that Ware had paid an equivalent to him for all the services rendered by plaintiff and him to the company, can it be contended that under the letter he intended to pay more money to them?

7. The letter of Ware written by Bugbee, means that Ware would pay the debt out of the land when sold, if anything was due, and nothing more. It will be construed with reference to the intention of the writer.

PHELAN, J.—Where there is no conflict in the evidence, it has been held by repeated decisions of this court, that the judge trying the cause may properly charge the jury on request to find for one party or the other, as the case may be, if they believe the testimony adduced. It is in the nature of

a demurrer to evidence. 7 Porter, 258; 2 Ala. 117; 6 ib. 752. We can discover no conflict in the testimony in this case, and the proper construction of the letters of Mr. Bugbee and Mr. Bryan, portions of the testimony, was matter for the court, as they were written evidence.

It is argued by the counsel for plaintiff in error, that a subsequent promise is to be implied from the receipt by Ware of this letter from Bryan, and his omission or neglect to answer it for so long a time. It is said, that an account furnished by one person to another, setting forth his claims, when received and not objected to for a length of time, is to be considered a just demand, and acquires the character of a *stated account.* Langdon v. Roane, 6 Ala. 518. Where a man is present and *states* an *account* with another, with whom he has had dealings, both parties, of course, admit expressly the correctness of the several items, and the balance *then* struck, and if the account was then barred by the statute of limitations, doubtless such a *stated account* would remove the bar. But are we to carry this doctrine to cases where an account, made up by one man and sent to another at a distance, is retained by the latter for a length of time without objection? We have been referred to no case, and upon principle we hold the thing not to be tenable. If you infer the original *correctness* of the account from such a state of facts, and the authorities seem to countenance that idea, it is going, in my opinion, full far enough, if not too far, except in special cases. But to *infer* from such a state of facts, not only the *original correctness* of an account barred by the statute, but also to go on piling inference on inference, and next infer a present *willingness* to pay such account, would be wholly inconsistent with the object and end of the statute of limitations, which is said to be to give repose against stale demands.

This brings us to the consideration of the letter written by Mr. Bugbee, under the instruction of Dr. Ware, to the plaintiff and Mr. Abbott. To remove the bar of the statute of limitations and revive a debt requires, according to the more recent current of decisions, either an *express promise to pay*, or a *clear* and *distinct admission of a present or existing indebtedness;* because, from such an admission, the law will *imply a promise* to pay, which in such case is equivalent to an *express promise*

to remove the bar. In the cases of Townes & Nooe, Ex'rs v. Ferguson, and Ross, Creditor, v. Ross, Adm'r *de bonis*, decided at the last term of the court, these questions have been recently considered, and the rule stated above adopted and followed, and the authorities there cited can be referred to. Pray v. Garulon, 5 Shep. 145.

I have looked carefully into Mr. Bugbee's letter to Mr. Bryan, and I must say that I do not think it contains either an express promise from Dr. Ware to pay him anything, or a *clear* and *distinct* admission that he owes him anything. I regard it rather in the light of a letter worded with due care and caution, to avoid the very thing which the plaintiff in error seeks to establish by it, such an acknowledgment of an old account as would remove the bar of the statute of limitations. Dr. Ware, who knew the date of these services, manifestly did not mean to lose the vantage ground of the statute, and Mr. Bugbee, an experienced attorney, did not intend he should. He begins by informing Bryan that the funds of the firm had been divided—had nothing in his hands; but then, he proceeds to say, there are some "unsold lands," and out of the "proceeds of these," when sold, "he desires the payment of *all* outstanding claims and demands, and *for the purpose of ascertaining what those demands are*, he desires both you and Maj. Abbott to forward your accounts;" he adds, that he "has paid Maj. Abbott considerable sums, and does not know what further demands there may be. He is anxious to have all old matters relative to Indian lands adjusted and settled as early as practicable." I must say, I think that if the terms of this letter will revive the demands of Bryan and Abbott, they would equally deserve to revive every outstanding demand against the firm of S. M. Haggerty & Co. The object of this letter, as I construe it, was to get a sight of the demands of Bryan and Abbott, in order to pay them or not, as circumstances might dictate; and in so doing, carefully to avoid either a promise to pay, or such an acknowledgment of a debt as would remove the bar of the statute of limitations, under which they were then known to rest.

From what has been said, it follows, that the charge of the court below was correct, and the judgment is affirmed.

EWING *vs.* BLOUNT.

1. In trover, the measure of damages is the value of the goods at the time of the conversion, or at any time subsequent thereto and before the trial, with interest on such value.
2. But this rule only applies when the property has not been regained by the owner. If the plaintiff has regained the possession, he is only entitled to recover damages equal in value to the use or service of the goods, and also compensation for any injury done to them; and if he is put to necessary and reasonable expense in regaining the possession, (otherwise than by suit at law), he may recover such expenses from the wrong-doer.

[Ligon, J., *dissenting*, held, that if the plaintiff regains the possession pending the suit, and its value when so regained equals its value at the time of conversion, or at any time between its conversion and return, then the defendant is entitled to an abatement of the damages to the extent of this value, and that judgment should only go for the interest.]

ERROR to the Circuit Court of Mobile.
Tried before the Hon. L. Gibbons.

THIS was an action of TROVER, brought by Blount against Ewing, for the conversion of a slave. It was shown that the slave ran away from the plaintiff in January, 1849, and soon afterwards was in the possession of the defendant, who sold him to one Vaughn. It also appeared, that the negro ran away from Vaughn in the year 1850, and was arrested and put in jail in Baldwin county, as a runaway. It was also proved, that the plaintiff came to Mobile, to recover possession of the slave, and did obtain him, and had him in possession at the time of trial. It further appeared, that the plaintiff expended about thirty dollars in regaining the possession of the slave, and that he was worth from eight hundred to one thousand dollars, and his hire by the month from twelve to sixteen dollars.

Upon this evidence, the court instructed the jury, that if they believed the slave was the property of the plaintiff, and that he ran away from him, and afterwards was in possession of the defendant, who sold him without the plaintiff's consent, then the plaintiff was entitled to a verdict; that if the plaintiff had regained the possession of the slave, he could not recover the value of the negro, and this should go in mitiga-

tion of damages; that this was an action sounding in damages, and the plaintiff had a right to recover such damages as would make him whole; that one rule the jury might adopt was, to find the value of the negro at the time of the conversion by the defendant, and before the recapture by the plaintiff, and give him interest on the amount as the measure of damages, if this would make him whole; but they were not limited to this rule; and that though they could not give the plaintiff hire in this suit, as hire, yet they could look at the value of the hire of the slave, from the time that elapsed between th conversion by the defendant and the recapture by the plaintiff, as a fact by which to ascertain the plaintiff's loss, and as a criterion by which to ascertain the plaintiff's damages; and that they might adopt the latter rule, if they thought it proper, or found it necessary in order to do full justice.

The court also charged the jury, that under the circumstances of this case, the plaintiff would be entitled to recover the necessary expenses he had incurred in regaining the possession of his slave.

The defendant requested the court to charge the jury, that the measure of damages was the value of the slave at the time of the conversion, or at any time subsequent thereto and previous to the trial, with interest thereon to the time of trial. This charge the court refused. To the charges given, as well as the refusal to charge as requested, the defendant excepted.

BOYLES, for plaintiff in error, relied on 1 Porter, 215; 6 Ala. Rep. 345: 9 ib. 144; 10 ib. 682.

CAMPBELL, *contra*, cited 14 Pick. 356; 17 ib. 1; 11 Shep. 339; 21 Wend. 379.

DARGAN, C. J.—The rule is settled by the decisions of this court, that the measure of damages in actions of trover is the value of the goods at the time of the conversion, or at any time subsequent thereto and before the trial, with interest on such value. Tatum v. Manning, 9 Ala. Rep. 144; Lee v. Matthews, 10 Ala. Rep. 682.

This rule we think a correct one, and we feel no disposition to depart from it; but it is only applicable to those

cases where the owner had not regained possession of the goods before the trial. Pierce v. Benjamin, 14 Pick. 354; Curtis v. Ward, 20 Conn. If the owner has regained the possession of the goods, he cannot recover their value, and is only entitled to the damages he has sustained by the wrongful deprivation of his possession, and such damages should be commensurate with the injury. If the chattel has been injured, he is entitled to compensation for such injury; and as he has been deprived of the use and service of the chattel, his damages should be commensurate with the value of the use or service, otherwise this action would be inadequate or incapable of doing complete justice. The hire or value of the service of the chattel must, in such cases, be one of the criteria by which the damages are to be ascertained.

The reason of the rule that the value of the goods, with interest, is the measure of damages, where the property has not been restored to the owner, is founded on the idea, that the value of the goods recovered is equal to the goods themselves; and interest on that value is the legal damages resulting from withholding such value. But when the property is returned to the owner, then the foundation for allowing interest is gone; for its value cannot be recovered; and we must then consider the plaintiff as the owner of the property, who has been wrongfully deprived of its use for a time. Consequently, no other rule will do complete justice, than to allow a recovery of damages equal to the loss sustained; and this can only be done by allowing damages equal to the value of the use or service of the property. See Curtis v. Ward, *supra.*

We also think that the plaintiff may retake his goods, if he can do so without committing a breach of the peace; and having this right, if he is put to expense, *necessary and reasonable*, to regain possession, (otherwise than by suit at law), he may recover such expenses from the wrong-doer; for it was his wrongful act that induced the expenditure of the money, and there is no injustice in holding him liable for it. This rule is sanctioned in the case of Greenfield Bank v. Leavitt, 17 Pick. 1; and I think it a correct one. Indeed, the general rule insisted upon by the plaintiff's counsel, that the value of the property, with interest, is the measure of damages, can never apply, save in those cases where the owner

has not regained the possession of the property converted. If he has regained the possession, then all the authorities agree, that the value of the property so regained shall go in mitigation of damages only, and not in bar of the suit; and in such cases we cannot look to the value of the property, as the measure of damages; *for the property the plaintiff has*, and has only been deprived, for a time, of its use; we must therefore compensate him for this deprivation of its use, which can be done only by giving him damages equal to the use or service, together with such reasonable expenses as he may have borne, in obtaining the possession. This is the only rule that will do complete justice, and it is one I cheerfully adopt. The general rule we have adverted to, that the value of the property, with interest, is the measure of damages, was adopted, because it was considered as coming as near complete justice, in all cases, as a general rule can; but when it cannot apply to a particular case, because the property has been returned to the owner, we then must apply such rules as will do complete justice, if we can; and those we have laid down, in my judgment, approach as near the ends of justice as any that could be applied; and there is certainly nothing in the form of the action that will prevent their application.

In conclusion, we will remark, that from the bill of exceptions it appears, that the defendant was the original wrong-doer. Had it appeared that he was a *bona fide* purchaser from the original wrong-doer, then the case would have been presented in a different aspect, and whether the rules we have laid down would have been applicable to him or not, we decline to express any opinion. And it may also be observed, that the bill of exceptions does not show, that the expenses for regaining the possession of the slave were incurred after the suit was brought, but rather that they were paid before the bringing of the suit; and construing the bill of exceptions most strongly against the party excepting, we are bound to consider the case as if it had appeared that the expenses were incurred before the action was commenced.

The ruling of the court is correct, and the judgment must be affirmed.

CHILTON, J.—When the effect of a recovery in trover is,

to change the property, and operate as a sale of the chattel to the defendant, upon the payment of the amount recovered, there is a substantial and an obviously just reason for allowing the value of the chattel, with interest thereon from the time of the conversion, to be the criterion of damages. In such case, the parties waive the tort, and treat the conversion as a sale, to be consummated upon the satisfaction of the recovery. But when the defendant sets up the defence that the property has been returned, then the reason for the above rule ceases, and the rule itself must cease. In such case, there is no change of property, and hence all inquiry as to its *value* is outside the proper scope of the matter to be ascertained by the jury. To assume that there was a sale; that the defendant agreed to pay the highest value of the property and interest thereon; that the return of the property operated as a sale back to the plaintiff from the time of the return, leaving the defendant the plaintiff's debtor to the amount of the interest accruing in the mean time, is to frame a set of assumptions having no foundation in fact, and serves only as a circuitous and arbitrary mode of ascertaining the damage the plaintiff has sustained by being deprived of the use of his property. I prefer adopting the plain common-sense rule, of compensating the plaintiff in such cases for the actual injury he has sustained by being temporarily deprived of his property. This rule does not militate against any adjudication in this State, and has been recognized by several of the states, in which the rule, as several times announced by this court, obtains. The plaintiff in no case receives hire as hire.

LIGON, J.—Very early in the history of this court, it was held, that upon a recovery, and satisfaction thereof, in an action of trover, the right of plaintiff to the chattel converted, vests in the defendant, as absolutely as if the latter had received it of the former on a contract of bargain and sale. White v. Martin, 1 Por. 215; Spivy v. Morris, 18 Ala. Rep. 254. In the former case it was also held, that the sale was complete from the time of the conversion, if the plaintiff elected to bring trover, and not detinue, for the chattel so converted, and that by bringing the action of trover the plaintiff waived the *tort*. His action then proceeds upon the principle

of a contract between the parties for the sale of the chattel, and an implied agreement on the part of the defendant to pay interest on the purchase money from the time it was due, that is, from the date of the conversion, until the day of recovery, or the time of the judgment. Proceeding upon this view of the rights and liabilities of the parties, this court, in the case of Strong v. Strong, 6 Ala. Rep. 345, held, that in trover, "the measure of damages is the injury actually sustained; therefore, in an action brought for the recovery of a slave, if the plaintiff have but a life estate in the slave, the measure of damages is not the value of the slave, but of the plaintiff's interest in the slave, with interest on that sum." In Tatum v. Manning, 9 Ala. Rep. 144, the question of the measure of damages in an action of trover, was again raised, and the court lays down the rule somewhat broader than it is to be found in Strong v. Strong, but without interfering at all with the principle on which it was rested in the case of White v. Martin, viz: a sale of the chattel; and says, that, "the measure of damages is the value of the slaves at the time of conversion, or *at any time between that and the time of the trial.*" Proceeding in this extension, as I suppose, (for the reason for their conclusion is not very clearly stated,) on the supposition that until the judgment, the defendant would have a right to surrender the chattel, and show such surrender in mitigation of damages; and if he failed to do so, it would show a willingness on his part to take the property at the highest price at which it might be valued at any time during the period when he might surrender it. In the opinion in this case, it is remarked, "that the rule with respect to slaves is so modified in South Carolina, as to allow the value of their labor to be recovered in addition to their value. But we are not aware of any reasons applicable to slaves, which may not be applied to any other chattels capable of use. We think the harmony of decisions is better sustained by recognizing the same rule as governing all descriptions of chattels. Indeed, it is evident, that the defendant in an action may not have realized the value of the hire, from slaves which he honestly supposed belonged to himself." It is plain from the language of the decision above quoted, that in the opinion of the court the hire of the slaves could, in no event, where the defendant

retained possession of them, form an element in measuring the damages.

In Lee v. Matthews, 10 Ala. Rep. 682, the court recognizes the rule as laid down in Strong v. Strong, and with regard to its extension in Tatum v. Manning, without referring to that case at all, Judge Ormond, who delivers the opinion of the court, says: "The value, therefore, of the property at the time of the conversion, with interest thereon to the judgment, is the measure of damages. This is the general rule, though there are certainly cases, where the jury would be justified in finding the value at a subsequent period, instead of the value at the time of the conversion, with interest," and he cites, Greening v. Wilkerson, 1 C. & P. 625; Whitehouse v. Atkinson, 3 ib. 344, which fully sustain his views.

From these decisions, it may now be regarded as the settled law of this State, that in actions of trover, in which the defendant still retains the property, the rule of damages is, the value of the property at the time of the conversion, or at any time between that period and the trial of the cause, with interest on such value from the time of conversion. And when the conversion of slaves is the foundation of the suit, their hire is not to be admitted into the computation.

That this is the result of our decisions on this subject, we all agree, and there is no difference of opinion as to the propriety of permitting the cases to remain untouched.

The case under consideration, I concede, is not fully within the rule established in the cases referred to, but the spirit of that rule when applied to it, leads my mind to a very different conclusion from that attained in the opinion of a majority of the court; and it is, as I conceive, more in harmony with those decisions.

If in a recovery in trover, the measure of damages is founded, as the court says, in White v. Martin, upon the principle of a sale of the property from the plaintiff to the defendant, with the purchase money due at the time of conversion, and such plaintiff is entitled to no more than the value of the property so sold, with legal interest, it is difficult to conceive, by what process it is, that he can recover higher damages when the whole principal of the debt is paid pending the litigation, than he could have recovered had the defend-

ant withheld the payment; yet such is the result of the opinion of the majority of my brethren. They all hold, that, if the action had proceeded without the slave being returned, interest on his value, with that value itself, would have been the measure of damages; but that since the slave is returned, and his value thus paid, a new rule of ascertaining the damages for the time he was held by the defendant, must be adopted, and the hire of the slave, and not interest on his value, is to be the measure of damages. The plaintiff is thus allowed, by his own act done pending the suit, to change his rights, and by this change to enhance his recovery. It is certainly at his option, to receive the property, or to let it alone, if it is offered to be returned pending the suit. If he takes it back, his damages are increased; if he lets it remain, they are lessened. So that it is in his power, if he can obtain the goods without committing a trespass, to entitle himself to new rights against the defendant, and this, pending the suit in which he seeks redress for the injury done him.

The adoption of such a rule is, in my opinion, wholly at variance with the principle on which our previous decisions have been founded, and should not be allowed, while those cases are permitted to stand.

The return of the property pending the suit, may be shown by the defendant in mitigation of damages. It may be asked, what damages? The answer is, the value of the chattel converted, with interest thereon from the time of conversion; for this is the rule adopted by the courts in actions of trover. So, if the property (a slave, as in this case,) is valued by the jury at eight hundred dollars, and has been detained one year before the trial, the additional damages, by way of interest, are sixty-four dollars, and to render our decisions harmonious, this is the only rule we can adopt. But in the opinion of a majority of my brethren, we should, in such a case, be guided by the rule in South Carolina, which is named, and repudiated by the court in Tatum v. Manning; and adopt the hire of the slave as the measure of damages, in part, and for the remainder, the expenses of the plaintiff in hunting him up, after he had brought his action, thereby electing to consider the slave sold, and with a full knowledge of the measure of his damages as fixed by law. Thus the defendant

enters the litigation with one set of liabilities, and comes out of it with another, without any new wrongful act committed by him while the suit was pending.

The return of the property pending the suit, if its value, when so returned, equals the value when the conversion took place, or at any period between the conversion and the return, should, in my opinion, entitle the defendant, when the damages are assessed under the rule laid down in the cases cited from our own court, to an abatement or mitigation of the sum so found, to the extent of this value, and the judgment should only go for the interest. It is said, however, in the opinion of the majority of the court, that, under the rule which requires that a bill of exceptions should be construed most strongly against the party excepting, it may be inferred from the present bill that the plaintiff below had regained the possession of the slave before the suit was brought, and thus the case would be placed beyond both the letter and spirit of the rule laid down in the cases cited. Let this rule of construction be applied to the record before us, with its utmost stringency, and I do not think such an inference can be legitimately drawn from it. It shows that the writ was issued on the 26th of March, 1850, and by the bill of exceptions we are informed that the slave ran away from the possession of Vaughn, to whom Ewing had sold him after the conversion, "*in the winter of* 1850;" this expression, I apprehend, is generally, if not universally, understood to mean the winter beginning in that year. It is then clear, that the recapture by Blount must have happened pending the suit, and at least eight or nine months after its institution.

I admit, that the cases cited from New York, Massachusetts and Connecticut, sustain the decision of the majority of the court; but I do not see that they harmonize with the principle on which this court has heretofore proceeded, and highly as I regard the source whence those cases proceed, I still prefer conformity to our own decisions, to submission to theirs.

McCULLOCH, Adm'rx. *vs.* JUDD, SONS & CO.

1. Where an account is placed, together with a number of others, in the hands of an attorney for collection, proof that the debtor came several times to his office, and examined the bundle of accounts in which it was filed, and made no objection to either the correctness or justice of any of them, is sufficient to charge him with an acknowledgment of the justness of the demand.
2. A creditor may sue one or all of the members of a firm, on a debt contracted in the firm name, and may declare on the demand as the individual liability of the partner or partners sued.
3. Under the statute of this State (Clay's Digest 324, § 67) a creditor may proceed to judgment against the personal representative of a deceased partner, and have execution against him for his recovery, *provided*, he makes the affidavit required by the statute; or he may proceed to judgment, without making the affidavit, but cannot have execution until he has sued the surviving partners to insolvency.
4. In a suit upon an account for goods sold and delivered, where the defendant pleads the statute of limitations of three years, and the plaintiff replies specially "that the account was between merchant and merchant," proof that the plaintiff and defendant were both merchants at the time the goods were sold is not, of itself, sufficient to support the replication.
5. An account containing several items of debit against the defendant for goods bought, and a single item of credit for cash paid, is not an account arising out of "the trade of merchandize between merchant and merchant," within the proviso of the statute of limitations, (Clay's Digest 328, § 88.)

Error to the City Court of Mobile.

Tried before the Hon. Alex. McKinstry.

The defendants in error declared against the plaintiff in error as administratrix of Charles McCulloch, deceased, in *indebitatus assumpsit* for goods sold, and on account stated between the parties. The defendant below pleaded *non assumpsit*, payment, statute of limitations of three years, statute of non-claim, and the insolvency of the estate of her intestate. The defendants in error replied generally, and took issue on all the pleas, except that of the statute of limitations of three years, to which they replied that the parties were merchants, and the account was between merchant and merchant. These pleadings were all taken in short by consent.

On the trial, the plaintiffs below read the deposition of one Knight, who deposed, "that he knew Mr. Coffin, one of the firm of Coffin & McCulloch, of Mobile, and he knew of goods

sold and delivered to them by the plaintiffs at different times since 1845; that at the time the sales were made the witness was the general clerk and salesman of the plaintiffs, and had a general knowledge of their business; that the book-keeper of the plaintiffs at the time said sales were made was one Wm. Coffe; that Coffe died about three years before the witnesses were examined; that during the time said Coffe was book-keeper, witness had access to the books, and had a general knowledge of all the business transactions of the plaintiffs; that the account attached to his deposition is a true abstract from the books of the plaintiffs; that the same was collated and compared by witness."

To this deposition is appended an account of Coffin & McCulloch, with Samuel Judd, Sons & Co., showing a balance in favor of the latter of $1538 65.

John A. Hitchcock, a witness for plaintiffs, testified that McCulloch, in his lifetime and before suit brought, called more than once at his office, for the purpose of seeing what he could do in trying to effect a settlement of sundry large claims then in the hands of Lockwood & Hitchcock, against the firm of Coffin & McCulloch, of which he was a partner, among which was the claim sued on; that all the claims were in one bundle, and McCulloch frequently had them in his hands for examination; witness had no remembrance of having seen him examine this account in particular; that the object of the visits of McCulloch to the office of Hitchcock & Lockwood, was to make arrangement for the settlement and liquidation of these claims; that at none of these interviews did he (McCulloch) ever make any objection to the account sued on.

The plaintiffs then, by consent of defendant's counsel, read in evidence to the jury a statement of the Judge of the Probate Court of Mobile county, showing that letters of administration were granted to Mary E. McCulloch on the estate of Charles McCulloch, deceased, on the 16th November, 1848, and on the 7th December, 1850, the plaintiffs filed an account against said estate for $1120 11 in his office.

The plaintiffs here closed their case; and the defendant offered no testimony, but asked the court to charge the jury, that upon this evidence the plaintiffs were not entitled to re-

cover; and also to charge the jury, that proof of a sale of goods to Coffin & McCulloch would not support the allegation in the declaration of a sale of goods to McCulloch alone. Both these charges the court refused to give, and the defendant excepted. The court then charged the jury, that the debts of a partnership were the several debts of each partner individually, and if the jury were satisfied by the proof that there had been a sale of goods by the plaintiffs to the firm of Coffin & McCulloch, as set forth in the account which had been shown to them, then the statement in the declaration of a sale to McCulloch was sustained by proof; to which charge the defendant also accepted.

The refusal to charge as asked, and the charge given, together with the judgment of the court, are here assigned for error.

O. S. Jewett, for plaintiff in error.

J. T. Taylor, *contra.*

LIGON, J.—This case must be considered as though it stood on demurrer to evidence, for the first charge requested of the court below by the counsel for the defendant, has been treated by this court as equivalent to such demurrer.

To authorize a recovery by the plaintiffs, on the several issues in the court below, they must show the justice of their demand; that it is not obnoxious to the statute of limitations of three years, and not barred by the statute of non-claim. And to make good their special replication, it must appear that their account with the defendant originated in the trade of merchandize, and is an account between merchant and merchant, within the meaning of the statute of limitations of this State. If these are made out by proof, or by legitimate inferences deduced from testimony, then the judgment in their favor in the court below must be here affirmed.

1. I will first examine the case under the issue made on the plea of *nonassumpsit.* On a review of the testimony, so far as it relates to the sale of the goods to Coffin & McCulloch, the presentation of the account to McCulloch in his lifetime, and his silent acquiescence in its correctness, after he had it in his possession, under such circumstances as create a fair

presumption that he had noted its contents and examined its items, we think the testimony of Knight and Hitchcock sufficiently establishes. The latter of these witnesses deposes, that this account, with others, was sent to his law firm, that they might settle and liquidate it; that McCulloch came several times and examined the bundle in which this one was filed, and never made objection to either the correctness or justice of any of them. This, we think, is quite sufficient to charge Coffin & McCulloch with an acknowledgment of the justice of the claim.

But it was objected in the court below that proof of an existing demand against the firm of Coffin & McCulloch, accompanied with an express or implied assumpsit on their part to pay it, would not authorize a recovery on a declaration which averred it to be the debt of McCulloch alone, and his undertaking to pay it as such; and to this effect the counsel for the defendant requested the court to charge the jury. The instructions were properly refused; for the question of the right of a plaintiff to sue one or all of the members of a firm, for a debt contracted in the firm name, and to declare upon the demand as the individual liability of the member or members so sued, is no longer an open one in this State. The act of 1818, Clay's Dig. 323, § 63, clearly confers that right, and the decisions in the cases of Von Pheel & McGill v. Connally & Anderson, 9 Port. 452, and Trann v. Gorman et al., ib. 456, show that it may be asserted in the manner it is here sought to be enforced. In those cases, however, the actions were brought against the partner himself, and not, as here, against his personal representative; but this, we apprehend, does not interfere with the manner of declaring, or the nature of the evidence necessary to support the declaration.

The right to sue the personal representative of a deceased partner separately, is also given by statute, and, although the act which confers it, imposes some modifications and restrictions upon the manner of commencing the suit or of enforcing the judgment, yet none of these extend either to the pleadings or proof. The act is in these words, "Where any person or persons shall have a cause of action against any copartnership, any of the members of which may have died, such per-

son or persons shall be permitted to sue and recover of the personal representatives of the deceased partner or partners, without first having prosecuted the surviving partner to insolvency: *Provided*, The plaintiff shall, before instituting such suit, make affidavit, in writing, before the clerk of the proper court, or the court itself, to be filed with the papers, that the survivor is insolvent, or unable to pay the amount of the debt, or is beyond the jurisdiction of the court: *Provided further*, That when any such representative is sued separately, which may be done without such affidavit, no execution shall issue against such representative, until an execution is *bona fide* run, and returned *nulla bona* as to the survivors." Clay's Dig. 324, § 67. The creditor by this act may proceed against the personal representative to judgment, and have execution against him for his recovery, without prosecuting the surviving partners to insolvency, if he makes the affidavit required by the first proviso in the statute; or he may, as in the case under consideration, sue and recover his judgment, without making such affidavit, but cannot be allowed to execute that judgment until he has sued the surviving partner or partners to insolvency. Our conclusion is, that there was neither a deficiency of proof, nor an error in the charge of the court, so far as the plea of *nonassumpsit* is concerned.

2. To the plea of the statute of limitations of three years, it appears by the record, the plaintiffs replied specially, that "the account was between merchant and merchant." This replication is neither very full nor formal; but great strictness in pleading is not required where the liberal practice of "pleading in short," as it is termed, is indulged at *nisi prius*. We will, therefore, treat this replication as though it contained all that is required to bring the plaintiffs within the proviso of our statute of limitations on open accounts. They might have replied generally to this plea, and relied upon the proof to show that the account on which they sue was an account stated, and thus, successfully, have taken the account out of the statute pleaded; but they have not thought proper to do so, and we are hence forbidden to examine the question in that aspect.

The statute on which both the plea and the replication are founded is as follows: "No action shall be brought to

recover money due by open account, after the expiration of three years from the accruing of the cause of action: *Provided*, That nothing in this act shall apply to the trade of merchandize between merchant and merchant, their factors and agents." Clay's Dig. 328 § 88. Does the proof in this case bring the plaintiffs within the exception contained in the proviso? We are persuaded it does not. It is true, they show themselves to be merchants, and also that the defendant's intestate was such, at the time the goods were bought; yet we apprehend that this proof alone is not sufficient for that purpose.

The English statute of 20th James I, with the exception of the word "servants," which is found in that act, is identical with our own. Under that statute, it has been held, that the word "accounts" was not intended to apply to settled or stated accounts between the parties; and in a case where the plaintiff proceeded in his declaration on an *insimul computasset*, and the plea was the statute of limitations, to which the defendant replied, that the money in the account mentioned became due and payable on trade between the plaintiff and defendant as merchants, and wholly concerned merchandize, a demurrer to the replication was unanimously sustained, and the replication held bad for the reason before stated. Webber v. Tivil, 2 Saunders, 121. In the case of Cotes v. Harris, referred to in Buller's Nisi Prius, 150, Dennison, Justice, is reported to have said and held, "that the clause in the statute of limitations in relation to merchant's accounts, extended only to cases where there are mutual accounts, and reciprocal demands between two persons." This, it is true, is but the language of one judge, but Mr. Justice Buller gives it his sanction, and Lord Kenyon quotes it with approbation in Cranch v. Kirkman, Peake's Nisi Prius, 121.

The distinction between an account current, which is held to be within the statute, and an account stated, which is not, has been often taken, and is now admitted in England. 1 Vesey, 456; 4 Mod. 105; 2 Vesey, 400; 1 Mod. 270.

The American courts have generally come to the same conclusion, where the statutes of their several States were substantially the statute of James I. See 6 Peters, 151; 5 Cranch, 15; 2 John. 200; 2 How. Miss. 786; 6 ib. 328; 2 Humph. 142; 5 John. Chy. Rep. 522.

In the first and last of the cases here cited, the English and American authorities are elaborately examined, in one, by Chief Justice Marshall, and in the other, by Chancellor Kent, and they arrive at the conclusion which we have attained. In the last case, Chancellor Kent uses the following clear and emphatic language: "To bring a case within the exception of the statute, there must be mutual accounts, and reciprocal demands between two persons;" and this, we think, is the only fair and reasonable conclusion to be deduced from all the authorities.

How stands the case here? The plaintiffs present an account against Coffin & McCulloch, with several items of debit, and a single credit for so much cash paid. Aside from the fact, that the testimony of Hitchcock shows this to be a stated, and not an open account between the parties, the account itself does not exhibit such items of debit and credit as will stamp it with the character of a mutual account between merchants, showing reciprocal demands arising out of the trade of merchandize. Failing to do this, the replication of the plaintiffs is not sustained by the proof.

3. On the plea of the statute of non-claim, we do not think the plaintiffs made out their case in the court below. That statute is in these words: "All claims against the estates of deceased persons shall be presented to the executor or administrator within eighteen months after the same shall have accrued, or within eighteen months after the passage of this act, or within eighteen months after letters of administration shall have been granted to the said executor or administrator, and not after; and all claims not presented within the time aforesaid, shall be forever barred from a recovery: *Provided*, That the provisions of this section shall not extend to persons under age, *femes covert*, persons insane or *non compos mentis*, to debts contracted out of this State, nor to claims of heirs or legatees claiming as such." Clay's Dig. 195 § 17.

By the act of the 5th February, 1850, the mode of presenting claims against the estates of deceased persons was altered, and the exception in favor of those creditors whose debts were contracted out of this State was abolished. The second section of that act provides, that filing the claim in the office of the Probate Court, out of which the letters of

administration issued, shall be a sufficient presentation to the administrator; and the fourth section repeals the exception in favor of those whose claims arise out of contracts made beyond the limits of the State, and places all claims on an equality, as to *the time* of their presentation. Sess. Acts 1850, p. 68.

The only proof of presentation of the claim of the defendants in error in this case is, the certificate of the Judge of the Probate Court of Mobile county, in which it is certified that this claim was deposited in his office on the 7th of December, 1850, and that letters of administration were issued to the plaintiff in error on the 16th November, 1848. This is not a presentation within eighteen months after administration granted, as required by the statute of non-claim, and consequently the claim is barred.

It results from what has been said, that the judgment must be reversed, and the cause remanded.

SAUNDERS *vs.* SAUNDERS' ADM'R.

1. In the construction of marriage contracts, the question whether the wife, on the death of the husband, takes an absolute estate in the property brought by her into the marriage, is entirely one of intention, to be collected from the general frame of the instrument; and such intention will prevail, although contrary to the express words of a particular clause.
2. A marriage contract was executed between S. and his intended wife, M., which provided that each party should retain the exclusive interest in all property, of whatever kind, owned by him or her respectively, at the time of the marriage, or afterwards acquired by purchase, gift, devise, bequest, or descent, and disclaim all interest in the property of the other. The instrument also contained the following clauses, viz.: "And it is here fully and expressly intended to be understood, and so agreed, covenanted, and sanctioned, that nothing is intended by this instrument, or other contract or understanding, to deprive either the said S. or M. from all and every right to have, hold and enjoy all the provisions, benefits, &c., of the law, as now, or may be hereafter provided or enacted, governing estates, after the death of either of the said parties; that the full intent and meaning of this instrument is, that, at the death of either said S. or M., this instrument, with all its meaning, shall cease to be of any effect, and of no avail, void and dead, and the surviving party enjoy all the privileges, rights, and immunities, as though

no contract ever existed, or written instrument had between them, and nothing is intended to prevent the law from the control, management, &c., as though no contract did ever exist; and nothing shall be so construed as to prevent the subscribing parties from mutually enjoying the goods, chattels, or effects of any kind, in the usual common comforts and necessities of life, or for the peace, happiness, prosperity and advancement of the parties and their families. In witness whereof, and intending this instrument, with all its meaning, to cease to be of any effect, to be void, cancelled, annihilated, and forever cease to be of any meaning, and of no effect, at the death of either of the parties, the parties have hereunto set their hands," &c. *It was held,*

That the wife, upon the death of the husband, took an absolute estate in the property brought by her into the marriage.

2. Where a marriage contract is executed, by which the wife, on the death of the husband, takes an absolute estate in the property brought by her into the marriage, she cannot come into equity, on the death of her husband, to have the contract established, and to enjoin her husband's administrator from proceeding at law against her for a recovery of the property. The contract, being a final and complete act, presents simply a question of construction, for the determination of which a court of law is equally as competent as a court of chancery.

ERROR to the Chancery Court of Mobile.

Tried before the Hon. J. W. Lesesne.

Thomas Saunders and Mary D. Moniac made a marriage contract, which, after reciting the intention of the parties to intermarry, provides: "Each of the before named parties, to wit, Thomas Saunders and Mary D. Moniac, having and owning property, at the date of their marriage, and all that shall hereafter belong to them, by heirship, legacy, or gift, from any relation or friend, either living or deceased, the right to convey and make title to the same shall be and remain with the said Thomas Saunders, for all now owned, or hereafter purchased, or received by legacy, &c.; and the property now owned by the said Mary D. Moniac, or that may hereafter fall to her by division or heirship, legacy, &c., the right to convey and make good and sufficient title to the same, shall be and remain with her; and it is fully intended by the parties, that no contract, covenant, or agreement, heretofore made, or hereafter made, shall hold the goods, chattels, lands, tenements, negroes, or any other species of property or effects, liable to discharge any other debt or liability, than such contracts made pursuant to this instrument, and pursuant to the intent and meaning of the same; and it is by this contract,

and intended to be so expressed, that each of the parties before named disclaim all right to sell, use, or convey the goods, chattels, lands, negroes, horses, mules, cattle, or stock, of any kind, owned at the date of this instrument, or that either of the parties may hereafter be entitled to, by legacy, gift, or heirship, from any relative or friend, either dead or living, without the written permission of the before named Mary D. Moniac; provided, always, that the said Saunders reserves and retains the right to contract, buy and sell, sue and be sued, and transact all manner of business, agreeably to his own instruction and judgment, upon the faith and credit of his own merit and property, owned by himself and hereafter purchased or gotten into peaceable possession, not including any kind of property now owned by Mrs. Moniac, or that she may hereafter be entitled to, from the estate of her deceased husband, or any other friend or relative, by deed, gift, or otherwise; and it is further understood, that nothing in this instrument is intended to deprive the said Thomas Saunders the doing and performing all acts and things, transact all kinds of business pertaining to the avocation of life, intended for the advancement, prosperity, &c., of the subscribing parties and families; and it is here fully and expressly intended to be understood, and so agreed, covenanted, and sanctioned between the said Thomas Saunders and Mary D. Moniac, that nothing is intended by this instrument, or other contract or understanding, to deprive the said Thomas Saunders or Mary D. Moniac from all and every right to have, hold, and enjoy, all the provisions, benefits, &c., of the law, as now or may be hereafter provided or enacted, governing estates, after the death of either of the before named parties, and that the full intent and meaning of this contract and instrument is, that at the death of either Thomas Saunders or his intended wife, Mary D. Moniac, this instrument, with all its meaning, shall cease to be of any effect, and of no avail, void and dead, and the surviving party enjoy all the privileges and immunities, as though no contract ever existed, or written instrument had between them; and nothing is intended to prevent the law from the control, management, &c., as though no contract did ever exist; and nothing shall be so construed as to prevent the subscribing parties from mutu-

ally enjoying the goods, chattels, or effects of any kind, in the usual comforts and necessities of life, or for the peace, happiness, prosperity and advancement of the parties and their families. Mrs. Margaret Tate is by the parties appointed a trustee, with full power and authority to act as such. In witness whereof, and intending this instrument, with all its meaning, to cease to be of any effect, to be void, cancelled, annihilated, and forever cease to be of any meaning and of no effect, at the death of either of the parties, we have hereunto set our hands and seals," &c.

The marriage was celebrated, and Saunders died, leaving his wife surviving. The administrator of the husband commenced an action of detinue against Mrs. Saunders, to recover certain slaves, and she filed her bill in the Chancery Court, setting forth the settlement, alleging that the slaves sued for were her property at the time of her marriage with Saunders, and praying that the settlement might be established, and the administrator enjoined from the prosecution of the suit.

From the evidence it appeared, that the negroes sued for were the property of Mrs. Saunders before the marriage, and that the estate of Thomas L. Saunders was insolvent. A decree was rendered, dismissing the bill, which was brought by writ of error to this court, and the rendition of the decree is here assigned for error.

CAMPBELL and P. WALKER, for plaintiff in error:

In the construction of marriage agreements, the intention must be given, and to ascertain that intention, regard must be had to the nature of the instrument itself, the condition of the parties executing, and the objects they had in view. 19 Ala. Rep. 146; Atherley on Marriage Settlements, 105; 1 S. & M. Ch. R., 355; 3 H. & M. 399.

To carry out that intention, courts of equity will disregard technical rules. 2 Iredell Ch. R. 241-3.

In order to give effect to the intention of the parties, a court of equity will reform a settlement, though made in the very words of the articles, if the legal effect of the words is not according to that intention. 1 McMullen's Eq. 358; 1 Hill's Ch. Rep. 101-3; 2 ib. 1, 3, 4-5; Atherley, 121-2.

Where, by mistake, the wife's property was made to appear to be the husband's, it was held that the settlement might be corrected, so as, conformably with the intention of the parties, to provide against the husband's bankruptcy or insolvency; and this, although the settlement was *complete* and not *executory*. Macqueen on Husband & Wife, Part 2, 270; Atherley, 153–8; 17 Ala. 557, 561–2–3; 1 ib. 161.

The language of the agreement in this case is sufficient to create a separate estate in the plaintiff in error. 1 White's Eq. Cases, 366–7; 376–377, note to case of Hulme v. Tenant; Macqueen, Part 2. 307–8, and cases there cited; 9 Paige, 364; 12 Ala. Rep. 29, 31–2.

Under the agreement, the wife will be regarded as a *feme sole*, and as always having retained the *jus disponendi*. 20 Conn. Rep. 173–4–5–6–7.

If the trustee named in the instrument had taken upon herself the execution of the trust, is it not clear, that her husband and those claiming under him would have been barred from all rights in the property? Is not this equally true where a trustee is dispensed with, or never assumes the trust?

It is not contended here by the defendant in error, that Thomas Saunders, in his life-time, had any rights over the property of his wife, as against her; and yet it is urged, that upon his death, all the limitations and restrictions contained in the agreement, and which were designed to protect and secure the property of the wife against his debts, are swept away, and that his decease confers upon his administrator, rights which were denied to himself.

Such a result is not sanctioned by correct legal reasoning, nor can it be fairly deduced from the marriage articles, that such was the intention of the parties.

It cannot be denied, that it was the purpose of the parties to protect the wife's property against the marital rights of the husband, and against liability for his debts, and yet the claim by his administrator is founded upon the idea, that the wife simply desired to limit this exemption to her husband's death; and upon the happening of that event, her separate estate was to be yielded up for their liquidation.

This idea is at war with the conclusions we must necessarily form, as to the motives inducing her to enter into the agreement.

The instrument, by express language, exempts the property from all liability for his debts or contracts. He surrenders all power of alienation, by stipulating that no part of the property should be disposed of without the *written permission* of the wife. It is a strange perversion of the meaning of the parties, to suppose, that they designed that the death of the one or the other should bring into being *marital* rights which had no previous existence under the agreement, and against which every guard was taken. 1 S. & M.'s Ch. Rep. 355, 362–3–4–5.

Under the articles, the husband had no right, and as the administrator claims under him, he can take nothing. The principle of a *specific* performance will shelter the plaintiff in error from interference by the administrator, she having fully executed her part of the agreement. The interference of the administrator is a wrong which a court of equity will not permit. It is insisted on by the plaintiff in error, that the estate is, by the language of the articles, secured to her, and therefore comes under the rule that an estate limited to the wife, does not, after the death of the husband, go to his administrator, but is retained to herself. 5 Iredell Eq. 111; 7 Johnson Ch. R. 229; 19 Ala. 146; 4 Watts & Serg. 546.

JOHN T. TAYLOR, *contra:*

1. The marriage contract cannot be considered in the light of "marriage articles." The bill itself does not claim this character for it; and the contract itself is a complete legal instrument, and could be used at law as such. The parties did not contemplate any further action to complete it; therefore there is no necessity for the aid of a court of chancery to carry it into effect. Atherley on Mar. Settlements, 123; ib. 117–91; 2 Cases in Chan. 17.

2. The bill it not properly drawn to warrant a reformation of the contract. It does not allege or even admit that there was any fraud or mistake in drawing it, but insists that it gives her what she seeks, on its face. The whole object of the bill seems to be, to get from the court a construction of the instrument, and the court of law is as competent for this as the court of chancery. Not having alleged fraud or mistake, they would not be allowed to prove it; and the bill is therefore without equity.

3. But suppose the bill was properly drawn and prayed for reformation, then I contend that the proof is wholly and entirely insufficient. The evidence is not inconsistent with the contract; it shows no more than the contract; besides, in all the admissions of both Mr. and Mrs. Saunders, they refer to "the contract under which they claim." The evidence in such cases, to set aside the writing sealed and witnessed by two witnesses, must be clear and unquestionable. See cases collected in Reavis' Dig. p. 302. Besides, when the writing is clear and certain, and no fraud charged, can parol testimony be allowed at all to contradict it? and if so, must not the witnesses to the deed be examined or accounted for? 19 Ala. 353; 18 Ala. 280; 12 Ala. 77; 14 Ala. 633. These authorities also show that the declarations of the debtor cannot affect the creditors, unless made before the debt is created, and this their evidence does not show.

GOLDTHWAITE, J.—The question as to the wife's taking, on the death of the husband, an absolute estate in the property she brought into the marriage, is entirely one of intention, to be collected from the general frame of the instrument; and such intention will prevail, although contrary to the express words of a particular clause. Spalding v. Spalding, Cro. Car. 185; Kentish v. Newman, 1 Pr. Williams, 235; Targus v. Paget, 2 Ves. 194; Allen v. Rumph, 2 Hill Ch. Rep. 1; Gause v. Hale, 2 Ired. Ch. 241; Gaillard v. Parcher, 1 McMullen Ch. 358. This rule we apply in the present case with the less hesitation, for the reason that the settlement bears upon its face the most palpable marks, that it was drawn by a person who was not only entirely ignorant of legal forms, but incapable of expressing his meaning with clearness and precision. The clauses in the instrument which are relied on as passing the title to the administrator of the husband are, first, the declaration that nothing was intended by the instrument to deprive the parties of the benefit of the laws governing estates of deceased persons, after the death of the parties, which were then or might be passed, but that the full intent and meaning of the contract was, that it should "cease to be of any effect, void and dead, and the surviving party enjoy all the rights, privileges and immunities as

though no contract ever existed, or written instrument had between the parties, and nothing is intended to prevent the law from the control, management, &c., as though no contract did ever exist;" and secondly, the attestation clause in these words; "In witness whereof, and intending this instrument, with all its meaning, to cease to be of any effect, to be void, cancelled, annihilated, and forever cease to be of any meaning, and of no effect, at the death of either of the parties," &c. But the construction contended for by the defendant in error, upon these parts of the instrument, is inconsistent with the intention apparent from the first clause referred to, that the death of either of the parties was to operate to the personal benefit of the survivor, in relation to the property which formed the subject of the settlement. The words that "the surviving party should enjoy all the rights, privileges and immunities, as though no contract ever existed," show conclusively, as we think, that the death of either party was to effect a beneficial change to the survivor; and the prominence of this idea in the mind of the framer of the contract, as shown by the reiteration of the effect which the death of either of the parties would produce on the settlement, resulted, as we incline to think, from the fact that a personal advantage was intended to result to the survivor. As, however, this benefit was not to arise until the death of one of the contracting parties, it could not have related to property of which either was in the full and complete enjoyment before the happening of the event referred to, and must be confined to the property of which the deceased party, by the terms of the instrument, had the enjoyment and control during life.

By a recurrence to the other parts of the settlement, the view we have taken is not only supported, but becomes apparent even to real conviction. Considered with reference to the other clauses, no one can entertain a doubt, that the object of the parties was, to secure the wife in the separate and exclusive control of the property possessed by her before the marriage, and to protect it against the improvidence of her intended husband, by excluding it from the reach of his creditors; and it is impossible to suppose that provisions like these, which, from their very nature, must have been inserted for the permanent benefit of the wife, were to be swept away

at the death of the husband, and his administrator invested with rights in relation to the property, not only greater than the intestate possessed, but which might defeat the object for which those rights were denied to such intestate. This supposition is so unnatural and improbable, so inconsistent with the other parts of the settlement, that we should require it to be evidenced by the most unequivocal terms before enforcing it.

We deem it unnecessary to go into the inquiry, as to the interest which the wife would take in the property of the husband, although we incline to the opinion, that it would be regulated by the statutes of descent and distribution, or, in the language of the settlement, "by the laws governing the estates of deceased persons." This question is, however, not presented by the record, and as the estate of the husband is reported insolvent, it is not probable that the question can arise upon this settlement. The only question we decide is, the one upon the construction of the instrument, as the case is now presented, that the wife, upon the death of the husband, took an absolute interest in the property brought by her into the marriage.

We see however no reason why the plaintiff in error should come into a court of equity. A party may come into that court to execute and establish marriage articles, or to reform settlements. But this case is not one of marriage articles. Everything has been done which the parties intended, and the contract is a final and complete act, presenting simply a question of construction, for the determination of which a court of law is equally as competent as a court of chancery.

It follows that there was no error in the decree of the Chancellor, which is here affirmed at the costs of the plaintiff in error.

HORTON, EXECUTOR, &c. *vs.* AVERETT.*

1. A legatee cannot proceed in the Court of Probate against an executor to recover a legacy, before the expiration of eighteen months from the granting of letters testamentary.
2. A judgment rendered by the Court of Probate against an executor in favor of the legatee, before a final settlement of the estate by the executor, is erroneous.

ERROR to the Court of Probate of Shelby.

WHITE & PARSONS, for plaintiff in error, cited Willis v. Willis, 9 Ala. 721; Price v. Simmons, 13 ib. 749; Clay's Digest 304, § 42; ib. 196, §§ 22, 23; Pamphlet Acts of 1846, page 14.

No counsel for defendant.

COLEMAN, J.—This was a proceeding had before the Probate Judge to recover a legacy bequeathed by Thomas Averett, deceased, to his wife, Lucinda Averett. To ascertain the law regulating proceedings of this character, it will be necessary to examine and compare the several statutes on this subject.

By the twenty-third section of the statute in relation to estates of deceased persons, (Clay's Digest 196,) it is declared, that "any person entitled to the distribution of an intestate's estate, may at any time after the expiration of eighteen months from granting the letters of administration, petition the Orphan's Court, setting forth his claim; whereupon it shall be the duty of said court to grant a rule on the administrator or administratrix (as the case may be) to make the distribution agreeably to law; but no administratrator, &c., shall be compelled to make distribution at any time, until bond and security be given by the person entitled to distribution, to refund a due proportion of any debts or demands which may afterwards appear against the intestate, and the costs attendant on the recovery of such debt."

"§ 24. Any person entitled to a legacy, or any estate by will, shall be entitled to the provisions of the foregoing sec-

* The opinion in this case was delivered at the June Term, 1851. It should have appeared in 19 Ala.—REPORTER.

tion, as in case of administrators: *Provided*, That nothing herein contained shall be so construed, as to compel any distributee to give bond and security as aforesaid, for his or her distribution of the estate of any intestate, after a final settlement shall have been made by the administrator or administratrix."

By the act of 1830, § 42, (Clay's Digest 304,) it is enacted, that "all decrees made by the Orphan's Court on final settlements on the accounts of executors, administrators and guardians, shall have the force and effect of judgments at law, and executions may issue thereon, for the collection of the several distributive amounts, against such executor, administrator or guardian."

"§ 43. When distribution of real or personal estate is decreed by said court, each distributee, heir or devisee, may and shall have his or her writ of execution or attachment, one or both in the case of personal estate; and in the case of real estate, a writ of *habere facias possessionem* against the executor, administrator or guardian; and the sheriff to whom such writ shall be directed shall execute the same according to the commands thereof."

We think it clear, that the distributions spoken of in the last section are those decreed by the Orphan's Court on *final settlements*, as mentioned in the preceding section of the same act.

According to our construction of the foregoing statutes, the court erred, 1st, In permitting the plaintiff below to proceed against the executor before the expiration of eighteen months after the granting of the letter testamentary;

2. In giving judgment for the legacy, and awarding execution thereon, before a final settlement of the estate of the said testator by the executor.

Let the judgment be reversed, and the cause remanded.

WILLIAMS, ADM'R. *vs.* MAULL.

1. A will contained the following clause; "I give and bequeath to my daughter M., to be held in trust by my executors, for her use during her natural life, and then for the heirs of her body forever, the following negroes, (naming them,) together with their increase. It is my will and desire, that the labor and increase of the said negroes shall, in no manner whatever, be liable for the debts of her present, or any future husband." The will also provided, that if the said M. should die "without leaving issue," then the executors should sell the negroes, and divide the proceeds among the testator's heirs at law then living. *Held,*
   That, *as against the personal representative of the husband,* the will created a *separate estate* in the wife, which a court of equity would protect.
2. Where slaves are sent home with a newly married couple by the wife's father, and are afterwards bequeathed by him to the wife for her sole and separate use, and the husband during his life treats them as his wife's property secured to her by her father's will, he will be held in equity to have elected to treat them as a loan, and not as a gift, and his representative is bound by that election.
3. Although courts of law cannot regard contracts entered into between husband and wife while that relation exists, yet courts of equity can recognize and enforce them, in favor of the wife against her husband's administrator, where the rights of third persons are not thereby injuriously affected.
4. Where the husband purchases negroes in the name of his wife, takes the bills of sale in her name, and treats the negroes during his life as her property, and the property thus purchased is a reasonable provision for her under the circumstances of the case, a court of equity will uphold the transaction, and secure the property to the wife against the claim of her husband's administrator.
5. The facts that the husband took the bills of sale in the name of his wife, and always recognized the property as belonging to her, disclaiming all ownership over it himself, are equivalent to a delivery of it to her, and a court of equity will regard the possession of husband and wife during his life, as the possession of the wife; and where the possession, under such circumstances, remains with the wife after her husband's death, equity will regard her as having a beneficial interest in the property, and not as holding it in trust for her husband's administrator.
6. A court of equity is the proper forum in which a wife should litigate with her husband's personal representative, her right to property which she claims against him, as her separate estate under her father's will and by post-nuptial contract with her husband.

ERROR to the Chancery Court of Lowndes.

Tried before the Hon. J. W. Lesesne.

This was a bill filed by the widow of James Maull, deceased, against his administrator, to enjoin an action of detinue

brought by the latter against her, to recover divers negro slaves which she claims as her separate property. The nature of her claim, and so much of the proof as is necessary to a proper understanding of the points decided, will be found in the opinion of the court.

T. WILLIAMS and T. J. JUDGE, for plaintiff in error:

I. As to the slaves claimed under the will of Philip Givhan.

1. These slaves went into the possession of James Maull upon his marriage in the lifetime of Givhan. The presumption of law then is, that they were intended as a gift, and not as a loan, "unless at the time a less estate was declared or limited." Olds v. Powell, 7 Ala. 652. There is no evidence in the record to rebut this presumption; consequently the husband's marital rights *eo instanti* attached, and the will of Givhan, subsequently admitted to probate, can have no effect upon his title.

2. The words of the will are insufficient to create in Mrs. Maull a separate estate. The rule is, that the intent to exclude the marital rights of the husband must be clearly evinced by the language employed. As to what words are sufficient, and what insufficient, to create such an estate, see Lamb v. Wragg & Stewart, 8 Por. 73; Cook v. Kennerly & Smith, 12 Ala. 46; Newman v. James & Newman, ib. 29; Story's Equity, §§ 1382, 1383. In this case, the *corpus* of the property is given to Mrs. Maull during her life, but there are no words excluding the marital rights of the husband. This was, in legal effect, giving the property for the use of the husband, as soon as he reduced it to possession. The latter part of the clause declares, "that the labor and increase of the slaves shall in no manner whatever, be liable for the debts of her present, or any future husband." Here also, are no words of exclusion, *as to the husband's marital rights. Creditors* only are attempted to be excluded, and as to them the provision is void. Rugely & Harrison v. Robinson, 10 Ala. 702.

II. As to the slaves purchased in South Carolina, which are alleged to have been purchased with her own means. The proof does not sustain the allegation on this point. As to the effect of the deed, executed in South Carolina in 1804, making her a free dealer, see Cornwell v. McDaniel, 1 Hill's S. C. R. 428.

III. As to the slaves purchased in Alabama. The bill alleges that Mrs. Maull and her husband worked their property together in common, and out of her share of the proceeds she purchased these negroes. But Mrs. Maull had no separate property in Alabama, and the allegations, as to the purchase by her, are not sustained by the proof. The fact that the bills of sale were taken in her name cannot alter the case, if they were purchased by the husband.

IV. The husband's conduct and declarations are relied on, to show title in the wife to all the slaves claimed.

1. We contend, that no conveyance to a third person for the wife was ever made by the husband. If there was any gift or grant to her, it must have been by parol, and delivery is essential to such gift. There was no delivery in this case; but on the contrary, the possession always remained with the husband, and he never relinquished his dominion over the property. Sims v. Sims, 2 Ala. 117; Blakey v. Blakey, 9 ib. 391; Hunley v. Hunley, 15 ib. 91: Machin v. Machin, 15 ib. 373.

2. In cases of gifts and grants by husband to wife after marriage, clear and incontrovertible evidence is required to establish them. 2 Story's Eq. § 1375; 2 Swans. R. 108. Such provisions must amount to only a reasonable settlement to the wife, else they are void even in equity. Ib.

3. The case of Puryear v. Puryear, 12 Ala. 13, does not militate against us, as is evident from an examination of the facts of the two cases. Machin v. Machin, 15 Ala. 373.

V. Admitting the case made by the bill, chancery has not jurisdiction, because complainant's remedy is adequate and complete at law. 12 Ala. 13; 16 ib. 486.

ELMORE & YANCEY, *contra:*

Husband and wife may make contracts with each other. If the consideration is valuable, the contract will be sustained against the creditors of the husband. If it be voluntary, the contract is good against the husband. 2 Story's Equity, § 1372, 1375, 1380, 1385, 1386.

If the agreement be between the husband and wife alone, the trust will attach, and he will be held a trustee for the wife. 2 Story's Eq. § 1380.

If the negotiations, or contract, or securities, or titles to property be in her name, they will at law belong to the husband, and on his death the wife cannot at law defend a suit for it by the husband's representative. A court of law looks alone to the legal title in personalty as well as realty. 2 Story's Eq. § 1386, 1387; Gamble v. Gamble, 11 Ala. 966; 14 Ala. 121, 134; 15 Ala. 373, 377; 16 Ala. 486, 491.

If the title, however, is taken in the name of a third person for her use, she may defend the suit at law, because of the title being in the third person. 16 Ala. 486, 491.

There is a difference between money and property. If a party is in justice and equity entitled to money, the defence to its recovery may be made at law. 12 Ala. 13; 2 Story's Eq., § 1256.

If a father sends negroes to his daughter after her marriage, the presumption is, that he intends them as a gift, and they belong to the husband; but this presumption may be rebutted by evidence, and the husband's declarations in regard to it are the strongest evidence of the character in which they are held. His acts and declarations years afterwards are good even against his creditors. Inge v. Murphy, 10 Ala. 894.

The declarations of the husband in such case, that he held under the will of the father, rebut the presumption of a gift, and the declarations of Maull that his wife held or owned property under the will of her father equally rebut the presumption.

We think the title to the negroes claimed under the will was in Maull. The words of the will give the property and title to Mary Maull, and vest by law the title in her husband. To prevent the title from vesting in the person to whom the property is given, there must be words of exclusion, as the title otherwise will be held to be with the property. There is no bequest to the executors of the property, or any part or interest, although there is a trust or duty imposed on them in regard to it, that is, to see that the purpose of the will was carried out. It is the same thing as if, after the bequest to his daughter on particular uses, he had added, "and I charge my executors with the duty of seeing executed these provisions of my will." In such a case, the executors could only act by refusing to let the property pass out of their hands, un-

til proper instruments were executed by the proper parties effectuating the intention of the will; or if they had given up the property, by filing a bill to compel an execution of such instruments. They could not at law recover the property after assenting to the legacy.

If the will vested the title in the executors, it is in them as executors only, and is a personal trust, and they died many years before Maull. Upon their death the title vested in Maull, or in no one; for there was no person in being, except himself, in whom it could vest, and a title is not permitted to be in abeyance, even as to real estate, except in cases of necessity. We have been unable to find any thing about the abeyance of titles to personalty.

We are satisfied, however, that the first view on this point of the will is the correct one, and that the title passed to Mrs. Maull, and vested in her husband. The rights of the husband in this property are excluded in the will, and if not, the property is covered by the instrument made by Maull, his wife and Givhan.

It is clear, however, that the title to the negroes acquired by purchase, vested in him. The agreement is not a deed conveying the title to any property to Givhan. It is a covenant on Maull's part that he will not claim any of the property, and in its legal effect it is a covenant to hold the title for his wife's separate use. The negroes bought by Mrs. Maull are covered by this agreement. The term goods means in law, all moveable personal property. The instrument is to be construed most strongly against Maull, and taking the whole context into view, especially as to what might be given or devised to her, there can be no doubt he intended to relinquish all dominion over any goods or personalty she might inherit or receive by gift, bequest or purchase. It cannot be seriously contended, that the instrument secured to her only a particular species of personal property, when there are no words of exclusion, but a term including every character of that property. But if there was any doubt on the subject, his acts and declarations, and her acts and declarations subsequently, prove what they meant, and, therefore, what was meant in the instrument by the terms used. He admits her right to these negroes, and she can have none in them, except

under the agreement, or because they were purchased with the proceeds of the labor of those acquired under the will, or because they were purchased with his money and given to his wife; and in either aspect of the case, the title is in him, and there is a clear admission or declaration of her right.

If the jurisdiction would attach as to any one of these negroes, the court will exercise it as to all.

CHILTON, J.—To facilitate our inquiries, we shall consider the slaves, the title to which is litigated, under two classes: First, Those claimed under the will of Philip Givhan; Second, Those acquired by purchase in the wife's name.

Mrs. Maull insists, that a separate estate in the slaves mentioned in the will, was vested in her by its provisions, and of this opinion was the Chancellor. Let us first examine this proposition, which is strongly contested by the plaintiff in error.

The clause in the will under which said slaves are claimed is as follows: "I give and bequeath to my daughter, Mary Maull, (wife of James Maull,) to be held in trust by my executors hereinafter named, for the use of the said Mary Maull during her natural life, and then for the heirs of her body forever, the following seven negroes, namely, Elsey, Harriet, Peggy, Sue, January, Amey's daughter, Cloe, and little Jack, together with their increase. It is my will and desire, that the labor and increase of the said negroes shall in no manner whatever be liable for the debts of her present or any future husband. But in case it should so happen, that my said daughter, Mary Maull, shall depart this life without leaving issue, then my said executors hereinafter named shall sell the negroes left my daughter, Mary Maull, as aforesaid, either for cash or credit, as they in their discretion may think proper, and divide the nett proceeds of the said negroes equally between such of my heirs as shall be then living, share and share alike, to them and their heirs forever."

We are not called upon to construe this clause with reference to the question, as to whether Mrs. Maull takes under it more than a life estate. The inquiry which arises is, does the language of the will vest in her an estate or interest in the property to her sole and separate use?

The *corpus* of the property, with the use, is given to the wife, but an executory trust is created in the executors, for the purpose of protecting the ulterior interest of those in remainder. There are no words indicating an intention to exclude the marital rights of the husband, either in the property itself or the use, except that the labor and increase, (by which we understand the profits derived from its use,) are not to be subject to his debts.

1. It is very clear that the appointment of a trustee, with the powers here conferred upon him, does not have the effect of vesting a separate estate in the wife. See Lamb, Trustee v. Wragg & Stewart, 8 Port. R.73; Carleton & Co. v. Banks, 7 Ala. Rep. 32; O'Neal et al. v. Teague, 8 Ala. Rep. 345; Cook v. Kennerly & Smith, 12 Ala. Rep. 42; Hale et al. v. Stone, 14 ib. 803; Bender v. Reynolds, 12 ib. 446; Moss v. McCall, ib. 630; Pollard et al. v. Merrill & Eximer, 15 ib. 169; Lenoir v. Raney ib. 667. Does the provision, "that the labor and increase of the property shall not in any manner be subject to the debts of the husband," furnish a sufficient indication of an intention to exclude him?

2. It is insisted by the counsel for the plaintiff in error, that this provision is void, and to sustain this position they refer to the case of Rugely & Harrison v. Robinson, 10 Ala. Rep. 702. A slight examination will suffice to show, that the case cited is not at all analogous to this. In that, the bequest was to a trustee for the use and benefit of Eli Robinson and his family, and the testator clothed the trustee "with full power and authority, and invested him with ample interest in the property, to exonerate and discharge and hold it free from the debts which said Eli may have contracted." An interest was given to Eli in the property, and an attempt was made to exonerate that interest from liability for his debts. The latter provision was held void, upon the ground that the liability to the debts of the proprietor of property, either at law or in equity, was an inseparable incident of its ownership.

So in Pollard et al. v. Merrill & Eximer, 15 Ala. Rep. 169, the deed conveyed property to trustees, for the separate and exclusive use of the husband and wife during their joint lives, nowise liable to the husband's debts. Here was an interest

attempted to be excluded from the debts of the party in whom it was vested, and we held that the provision, which sought to exempt the property from liability to the debts of the owner, was void. Such has long been considered the settled rule of law, both in this country and in England. See Foley v. Burnell, 1 Bro. C. C. 274; Brandon v. Robison, 18 Ves. 429; Hallett v. Thompson, 5 Paige 583; 2 Story's Eq. Jurisp. § 974, *a.* In such cases, the provision which attempts to place the property beyond the reach of creditors is repugnant to the estate created by the instrument, and consequently is void. But such is not the case with the will before us; for here the property is *given to the wife*, not to the husband, and hence the clause, that it, or the issues and profits of it, shall not be subject to *his* debts, is perfectly consistent with *her* estate, and may, therefore, be upheld without violating any rule of law.

It is said, however, that giving the property to her is equivalent to a gift to the husband, because of their legal identity; and this argument would be unanswerable, but for the fact, that it assumes the provision against the liability of the property to the husband's debts to be void, whereas it is the duty of the court, to give effect to all the words of the will, and to impute meaning to them, if capable of meaning, without violating the general intent, or any other provision of the will with which they may appear inconsistent. 10 Bacon's Abr. (Bouv. Ed.) 533; 1 Ves. (Sum. Ed.) *n.* 4; 18 Ala. Rep. 132, 159, 160. And without determining how far a court of common law might countenance the doctrine contended for by the counsel for the plaintiff in error, we think it quite clear, that a court of equity, seeing that the testator has created an interest by language utterly inconsistent with the idea of its vesting in the husband, but perfectly in accordance with a separate estate in the wife, to whom, by name, the property is given, will disregard the legal fiction of unity, and effectuate the intention of the testator, in the only way it can be done, by excluding the marital rights of the husband. This gives effect to each clause in the bequest, and is not inconsistent with any other provision in the will. Although it is usual to insert, in instruments designed to convey a separate estate to a married woman, the technical expressions, "to

her sole and separate use," yet it is well settled, that no particular phraseology is necessary. "It is sufficient," says Justice Ormond, in Newman v. James & Newman, (12 Ala. Rep. 32,) "that the intent was to secure it to the use of the wife, in such a mode as to be inconsistent with the enjoyment of the gift by the husband, or with the exercise of dominion over it by him."

Whenever it appears from the whole instrument, that it was the donor's intention to convey the property to the married woman's use exclusive of her husband, then, without regarding the form of the instrument, or the particular language used, the husband's marital rights do not attach. Brown v. Johnson, use, &c., 17 Ala. Rep. 232–3.

3. It is objected, however, that the property bequeathed by the will to Mrs. Maull had previously been sent home with her by her father upon her marriage, and that it thereby vested in her husband, leaving no estate in the testator, (Givhan,) and consequently none passed by his will; and Olds v. Powell is relied on, to show that the husband, James Maull, acquired a title to this property as a gift. That case determines that property sent home with a new married couple, will be presumed to be a gift, unless a less estate is at the time expressly declared or limited; that the question as to whether it was a gift, or a mere loan, was one of intention; and that the declarations of the donor, made at or about the time the property was sent, were admissible to prove such intention.

It will be borne in mind, that in the case before us the controversy is between one who represents the husband, and the party claiming under the will. No creditor complains; for the estate is solvent, and their claims are satisfied, or may be satisfied out of its ample assets. The personal representative stands in precisely the same relation to this property in which the deceased stood, as respects his right to recover. Now upon examination of the proof, it is plain from the repeated declarations of James Maull, that he regarded this property as belonging to his wife, and as secured to her under and by virtue of her father's will. He must be presumed to have known whether he received the property upon his marriage as a gift, or as a loan. He has elected to treat it as a loan—has recog-

nized as valid a subsequent disposition of it by his father-in-law, and his representative is bound by that election.

In Machen v. Machen, 15 Ala. Rep. 373, we refused to give to the repeated declarations of the husband, that certain property belonged to his wife, the effect of vesting her with the title; but it will be remembered that, that was a proceeding at law, and no contract directly made by the husband with the wife, much less his mere declarations, could have clothed her with the *legal* title. Gamble v. Gamble, 11 Ala. Rep. 966, relied upon in that case, is conclusive upon the point to which it is cited.

Although courts of law cannot regard contracts entered into between husband and wife while the relation exists, yet courts of equity act upon a very different principle; and this brings us to the consideration of the nature of Mrs. Maull's claim to the slaves which were purchased in South Carolina and in this State.

These were purchased in the name of Mrs. Maull, and it is contended that the effect of such purchase is to vest the title in her husband. This is unquestionably true as respects a court of law; but such is not its effect in a court of equity, which regards the parties as capable of contracting with one another, and will carry out and give effect to their agreements, if in so doing the rights of third persons are not injuriously affected. Concede that the husband purchased these slaves with his own money, as is claimed by the counsel for the plaintiff in error, but took the title in the name of his wife, and treated the property as belonging to the wife, as the proof in the case shows, how is the transaction to be viewed by a court of equity? If the husband designed to give the wife no interest in the property, why were the bills of sale taken in her name? Why did he not take the evidence of title directly to himself? The answer to this inquiry can alone be found in the fact, that he designed the purchases for the sole benefit of his wife; and this intention abundantly appears from the record, when we consider these bills of sale in connection with the contract entered into between them in South Carolina, and the conduct and declarations of the parties.

Although, according to the principles of the common law,

there is a positive incapacity on the part of the married couple to contract with each other, yet the courts of equity often give full effect and validity to post-nuptial contracts. 2 Story's Eq. § 1372. "If," says this author, "the husband should, after marriage, for good reasons, contract with his wife, that she should separately possess and enjoy property bequeathed to her the contract would be upheld in equity." As to gifts and grants of property by a husband to his wife after marriage, they are ordinarily void at law; but courts of equity uphold them in many cases where the law declares them void. Ib. § 1374. It is said, the husband cannot give the wife his whole estate, Beard v. Beard, 3 Atk. 72; but if it amount to a reasonable provision, and there is no ground to suspect fraud or imposition, courts of equity will uphold the transaction, Ib. Upon the proof in this case, we do not think that it can be affirmed, the property secured to the wife is an unreasonable provision for her *under the circumstances.*

It is objected, however, that if we regard the property purchased in the name of the wife as a gift, there is no evidence of such gift having been perfected by a delivery. This position is not sustained by the record. We have seen that the wife had separate property secured to her by the will of her father. This was in the possession of husband and wife, but recognized by the husband as belonging to her. It is by no means an unreasonable inference, that the after acquired property, which was recognized also as hers, should be held in a similar manner. And as the *law* would refer the possession to the holder of the *legal* title, on the other hand a court of *equity* will indulge the presumption that the party *really* and *beneficially* interested was in the the possession.

But we are not left to indulge in presumption merely. The facts that the husband has taken the title in the name of his wife,—that he disclaimed all ownership of it up to the time of his death, and that she is now in possession, armed with this evidence of title, are sufficient in a court of equity to uphold her claim. We will not say but that it was competent for the husband, while living, to have revoked the gift or settlement. We are inclined to the opinion that he had this power; but as to the property now in dispute, the record no where shows that he exercised this power. That he disposed of some property simi-

larly situated, does not prove a revocation as to this. The title having been made to her, *and remaining in this condition at the death of the husband, and the transaction being unaffected by any cotemporaneous evidence rebutting the presumption of a gift*, she cannot be regarded as holding the legal title in trust for his representatives, but as having a beneficial interest in the property. See Rider v. Kidder, 10 Ves. 367; Greene v. King, 2 Sir Wm. Bla. 1211; Kingdon v. Bridges, 2 Vern. 67; Back v. Andrews, ib. 120; Spence's Equity Jurisp. Vol. 2, pp. 218, 219.

It may be conceded that the deed made in the State of South Carolina is void, (a point, however, which we do not decide,) yet it serves as an index to the intention of James Maull, the husband, in taking these bills of sale in his wife's name. This, coupled with the other facts above alluded to, leaves no doubt upon our minds that the husband designed these slaves to vest in his wife; and makes it our plain duty to prefer her claim to that of his administrator.

What we have said as to the different views taken by courts of law and equity, of contracts between husband and wife, sufficient shows that a court of equity is the proper forum in which the wife should litigate her right to this property.

The decree of the Chancellor, being in accordance with the views we have expressed, is, in our opinion, entirely correct, and is consequently affirmed.

GANNARD ET AL. *vs.* ESLAVA ET AL.

1. The objection cannot be raised for the first time in the Appellate Court, that the order of publication against non-resident defendants was not accompanied by an abstract of the bill, as required by the seventeenth rule of Chancery Practice.
2. Where a vendor conveys with covenant of warranty, and his vendee afterwards conveys portions of the land, with covenants of warranty, to two others, retaining a part himself, and the three are evicted of an undivided third part of the land by title paramount to that of the original vendor, they may join as complainants in a bill against him, to reimburse themselves for the loss sustained by the breach of his warranty.

3. Where a deed contains a general covenant of warranty, and there is, at the time of its execution, a paramount outstanding title, by which the vendee may be, or actually is afterwards evicted, he is a "creditor" of the covenantor, within the meaning of the statute of frauds, (Clay's Dig. 254 § 2,) from the execution of the deed.
4. In this State, a *voluntary* conveyance, though made *bona fide*, and in consideration of natural love and affection, is void as to the *existing creditors* of the grantor.
5. Where a husband purchases and holds bank stock in his own name, as trustee for his wife, although the advancement will be held a valid gift as against his personal representative, yet the husband may revoke it at any time during his life, and a court of equity will subject it to the payment of his debts.
6. The case of Baker et al. v. Heirs of Chastang, (18 Ala. 417,) touching the right of a married woman in this State to dispose of her real estate by will, and the effect of the probate of such a will, re-affirmed.

ERROR to the Chancery Court of Mobile.

Tried before the Hon. J. W. Lesesne.

This bill was filed by Miguel D. Eslava, Joseph Bogerean and James Johnston, against Victor Gannard, Susannah Gannard, his wife, Octavia Gannard and Tuskena Garnard, (their children,) and the Merchants' Insurance Company of Mobile. It alleges, that said Victor Gannard and wife sold a certain lot, situated in the city of Mobile, to complainant Eslava, by deed dated October 3, 1835, containing general covenants of warranty; that Eslava sold part of this lot to one Schuyler, by deed with warranty dated January 21, 1836; that said Schuyler, by his deed with warranty dated June 1, 1836, sold to Jumelot, and Jumelot to Bogerean in 1838; that said Jumelot and Bogerean, while in possession, made some valuable improvements, and leased to Baker and Primo; that Schuyler mortgaged to Eslava the lot which he had purchased of him; that Eslava foreclosed the mortgage, and sold the lot, and he and Johnston became the purchasers in April, 1839; that Johnston leased his lot to one Knellock; that an ejectment suit was brought against the tenants in possession, by the heirs of Chastang, who, at the Spring Term 1848 of the Mobile Circuit Court, recovered a verdict and judgment for an undivided third part of the lots of Johnston and Bogerean, and sixteen feet nine inches of the lot purchased at the Register's sale by Eslava, of all which the parties respectively were ousted by the sheriff; that by reason of the

premises, Gannard's covenant of warranty was broken, to their damage.

It is also alleged, that Gannard knew of this defect of title at the time of sale, and intended to defraud; and that for this reason, after converting his real estate and other property into money, he removed with his family to France; that before his sale to Eslava, Gannard owned, or afterwards purchased with his own money, fifty shares of stock in the Merchants' Insurance Company of Mobile, and, after the sale aforesaid, caused sixteen shares to be transferred to his daughter, Octavia, sixteen shares to his son, Tuskena, and eighteen shares to his wife, Susannah; and that since the transfer, Gannard had received the dividends on this stock as his own.

The bill prays, that the stock in the Merchants' Insurance Company may be sold, to reimburse to complainants their losses sustained by the recovery of Chastang's heirs against them, and that defendants may be enjoined for selling, or permitting a transfer of stock. Orders of publication were made against all those defendants who were shown to be non-residents, and guardians *ad litem* were appointed for Octavia and Tuskena Gannard, who were shown to be minors.

Gannard and wife in their answer admit that they executed the deed to Eslava, and deny all knowledge of the other conveyances. They insist that the action of ejectment should not be conclusive on Gannard, as to the breach of warranty, and that he has a good title, which is set out, and which he asks may be considered. The substance of this title is, that the land belonged to Madame Perouet, whom Gannard married, and thereby became tenant for life; that his wife made a will, and devised the land to him, and also a deed under which he went into possession, and so remained until he sold to Eslava.

The answers also state, that before the sale to Eslava, Gannard owned forty-three shares of stock in the Bank of Mobile, in his own name, purchased May 15, 1834; six shares in the name of his wife, purchased August 20, 1832, and nine shares, purchased May 15, 1834; and six shares in the name of each one of his children, purchased May 15, 1834; that in May 1836, all this stock in the Bank of Mobile was sold; that the shares of his wife and children, which sold

at a premium, brought $3375, and this he invested on the same day in stock of the Merchants' Insurance Company of Mobile; that the investment in the Bank of Mobile stock was made previous to the sale to Eslava, as an advancement to his wife and children, at a time when his pecuniary situation gave him a good right to make such an advancement. They also ask, that the rights of ther infant children, who reside with them, may be protected. This abstract of the facts will be sufficient for a proper understanding of the opinion.

At the hearing, the Chancellor decreed that the fifty shares of stock, which stood in the name of Mrs. Gannard, Octavia Gannard and Tuskena Gannard, on the books of the Merchants' Insurance Company of Mobile, should be condemned to the satisfaction of complainants' demands.

The errors assigned are: first, in rendering a decree when all the parties defendants were not in court; secondly, in not dismissing the bill for misjoinder of parties; thirdly, in rendering a decree in favor of complainants on the proof.

P. HAMILTON, for plaintiffs in error:

1. This is a bill of injunction against non-resident defendants, two of whom are infants. The rule of practice requires the publication should contain an abstract of the allegations of the bill. Clay's Dig. 614, Rule 17; see Pub. Rec. pp. 13, 14. No guard. *ad lit.* was appointed for infant Tuskena. The order of publication states she is an infant. 3 Porter's Rep. 10. No answer was filed for infant Tuskena, nor has she been brought properly before the court, and in the mode of service the direction of Rule 41, Clay's Dig. and Rule 4, 2 Ala. Rep. were not complied with. 16 Ala. Rep. 509.

2. The decree is believed to be erroneous on the testimony. The stock properly belongs to the wife and children. It is an advancement made by the husband and father. 2 Story's Eq. §§ 1203–4; 14 Ala. Rep. 788 and author's. 2 Beavan Rep. 447; 1 Young & Col. Rep. 65. The possession of the title papers and receiving the dividends by the father, does not rebut the presumption of advancement. 1 Young & Col. Rep. 65; 14 Ala. Rep. 792–3–4. This is true of both the investments. The Bank of Mobile stock was procured before

the deed to Eslava; before any claim or contract had been made with Eslava. If the stock in the Bank had remained, no question would have arisen; for the investment was made before the deed to Eslava, and Gannard was amply able to make the investment.

It is contended, the Insurance Company stock is a substitute for the Bank stock, and entitled to the like protection. It was undoubtedly so intended. Gannard regarded himself as re-investing for the benefit of his family, in better securities, the proceeds of the Bank of Mobile stock. Equity looks to the subject of a transaction, rather than its form. 1 Story Eq. 179. The receipt of the proceeds of the Bank stock by Gannard, forms a valuable consideration for the present investment. It should be protected. 8 Cowen's Rep. 436.

3. The complainants have no right to subject this stock. *They were not creditors.* If the present investment is a continuation of that in Bank of Mobile, they clearly have no such claim; that was made in 1834; the deed to Eslava in 1835. If confined to investment in Insurance stock, in 1836, they were not creditors. The covenant of warranty was made in October 1835; the eviction by title paramount occurred in 1848, thirteen years afterwards.

No cause of action accrued till twelve years after the transfer of this stock; till then no debt was created, no debt existed. Eslava was not a creditor of Gannard. A voluntary deed of this kind is good, except against creditors and purchasers. Clay's Dig. 254 § 2; so held in 8 Porter's Rep. 351. As to who are creditors, 1 John. Cases 73; 9 John. Rep. 127; 15 ib. 261; Douglass' Rep. 92; 1 Conn. Rep. 299–300–304, *et seq.* opinion Hosmer, J.; 8 Term. Rep. 521; 3 ib. 539; 3 Atkins' Rep. 410–412. The English statute, 13 Eliz. uses the terms "creditors and others." Atherley on Marriage Settlements, 224–5; 1 Am. Leading Cases, 57. The same words are found in the New York and Maine statutes. Not so in the Alabama statute; the term "creditors" only is used. As to the effect of the words "and others," *vide* 2 Atkins' Rep. 601; Atherley on Mar. Set. 224–5, and Law Lib. 117; 5 Cowen's Rep. 67, Sutherland, J., which is the foundation of all the decisions in New York. For what is decided in 4

Greenl. Rep. *vide* end of the opinion, p. 2078, where positive fraud was found by the verdict.

The English Acts of Bankruptcy use the word "creditors." Chitty's Black. Com. Book II, p. 480, and note, edition 1832. What is meant by "creditors" in that act, and what debts, may be proven, *vide* auth. Sup.; 2 Comyn's Dig. Tit. Bankrupt. D. 3, and notes; Bacon's Abgt. Tit. Bankrupt. E. The Tennessee statute is the same as the Alabama statute, and upon it see 9 Humph. Rep. 519–521; 5 Humph. 26–34; ib. 66–67; 15 John. Rep. 571–588; and see 2 Lomax Dig. 366–367 on Va. statute. This court has repeatedly given a meaning to the term "creditors," as found in the Alabama statutes. Clay's Dig. 256 § 5; *vide* 8 Ala. Rep. 866; 9 Ala. Rep. 436; 12 Ala. Rep. 309; ib. 367; 17 Ala. Rep. 503, top of page; Clay's Dig. 502 § 2; Jones v. Burden, at present term; Clay's Dig. 194 § 10. What is meant by "claim," 12 Ala. 551, head note 4.

4. By the terms of the statute, (Clay's Dig. 255 § 3) this property is secured to the wife and children; for at any event there is a good consideration, if not one deemed valuable. The natural love and affection of the defendant for his family, and his obligation to maintain them, is a good consideration, and should be supported in the absence of fraud.

5. The bill should have been dismissed for a misjoinder of parties. The answer contains a demurrer. Even if Eslava was a prior creditor, Johnston and Bogerean were not; their title was acquired long after the investment in Insurance stock. *Vide* bill. The right of all the complainants must be established, or the bill will fail.

6. There is no proof of fraud in making this transfer to the wife and children; and fraud will not be presumed, to defeat the rights of married women and children, who are always carefully protected in equity. The proof is ample, as to the ability of Dr. Gannard to make this investment in favor of his wife and children.

7. It is denied that the covenant of warranty is broken. Gannard was no party to, or notified of the action by parties claiming to be heirs of Chastang. The record in the case of Baker et al. v. Heirs of Chastang, (reported 18 Ala. 417) shows the title of Gannard, and is to be regarded as part of

this case. That title rests on the will of Mad. Gannard, devising this lot, among others, to her husband, Dr. V. Gannard, which was duly admitted to probate by the Orphans' Court of Mobile county. The court is respectfully requested to reconsider the ruling of the court made in that case, by two out of the three Judges: 1. on the power of a married woman to make a will of real estate in Alabama; 2. upon the effect of the judgment of the Orphans' Court, thus offered collaterally as evidence in another case.

It is submitted that, by the Alabama statute, a married woman may make a will. Stat. of Wills, Clay's Dig. p. 597. The same word "seized" is used in the statute of descents. Clay's Dig. 168. There was no tenancy by the courtesy in this case. 5 Ham. Rep. 65; Reeves Dom. Rel. 137–154, and see 17 Vermont Rep. 323. By the English statute, married women are in terms excepted; not so in the Alabama statute. 1 Jarman on Wills, 27, *et seq.*; 2 Kent's Com. 170; Reeves Dom. Rel. 137 *et seq.*; 17 Vermont Rep. 328. By the statute of this State, all wills, whether of real or personal estate, must be probated by the Orphans' Court of the county. 16 Ala. Rep. 590–1; 2 Ala. Rep. 235. The judgment of that court becomes binding as the judgment of a competent court, over subject within its jurisdiction, and cannot be collaterally impeached. 5 Mason Rep. 334; 4 Mason Rep. 461; 8 New Hampshire, 124; 3 Story Rep. 13; 1 Story Rep. 318; 3 Day Rep. 318. While the same court, in a preceding volume, 2 Day. 163, had on a direct appeal decided, a married woman could not make a will. The decisions of this State have been of the strictest character, in maintaining that voluntary conveyances are void against existing creditors. But to affirm the doctrine of this case, would go a bow shot beyond any thing decided, and effectually forbid a parent setting apart any of his property for the benefit of a wife or child, if there existed the possibility of a demand thereafter arising against him.

John A. Campbell, *contra:*

1. The creditor, within the meaning of the statute of frauds, § 2, 254 Clay's Digest, is one who has or may have a claim or demand against the debtor, upon a contract in exist-

ence at the date of the voluntary conveyance, and embraces the covenantee in a covenant of general warranty, who is evicted by a title outstanding and paramount at the date of the contract. Roberts on Frauds, 457, 450; 10 Vesey, 360; 18 Wendell, 375; 4 Greenleaf, 195; 8 N. Hamp. 48; 1 Robinson Va. R. 123; Jackson v. Seward, 5 Cowen R. 67; 8 ib. 428; 11 Illinois Rep. 300; 18 John. 425; 1 Conn. 275; 4 Eng. Con. Ch. R. 262; 18 Ala. R. 586.

2. The conveyance of Gannard to his wife does not place the property beyond the reach of his creditors. It is now the property of Gannard, and liable for the payment of his debts. 2 Story's Rep. 316; Clancy on Rights, 90, 98; 5 Metcalf, 280, 320; 17 Maine R. 301.

3. The conveyance to the children is fraudulent, as against an existing creditor. 18 Ala. Rep. 586, 596, and cases cited.

4. There is no statement in the bill of a misjoinder of parties, nor of multifariousness. The question cannot be raised here. 15 Ala. Rep. 472; 10 ib. 310.

5. The parties complaining are jointly liable on the covenant of warranty, and in the costs of the ejectment suit. The suit is properly brought under the decisions in favor of creditors. 16 Ala. Rep. 233; 4 Howard S. C. 127; 10 Ala. Rep. 432.

6. In the matter of the service of process: the rules 40 and 41 afford the source from which the process in this case was made. The order of publication was transmitted to the parents and the children; so that each had notice. All services, to affect children, must be made on the parents.

7. The act of 1845 was made for the benefit of *the defendant debtors.* The publication was designed for their benefit. In this case the father and mother, to whom the publication should have been transmitted under the rule, have in this case appeared to the cause, and have fully answered the same. The bill itself has been shown to them, and they have answered it on knowledge. 9 Ala. Rep. 180; 5 Ala. Rep. 158.

8. Had there been a publication, it would have been sent to the *parents* of the children under the rule. The record shows a service of a copy of the bill upon them. In *the answer of Gannard and wife, they represent that the defendants,*

Octavia and Tuskena are minors, and pray that their interests may be protected by the court. Here is what the rule in reference to infants was designed to secure for them.

9. The court was bound to appoint a guardian *ad litem* in this case. Gannard and wife decline, and repose this duty upon the court. The infants were then legally represented before the court.

10. *The point cannot* be taken in this court, that the publication was not full. 7 Ala. Rep. 823; 12 ib. 265.

11. The bill is filed upon the equity of the act of 1846, but not upon the act itself. 16 Ala. Rep. 234.

PHELAN, J.—It is objected to the decree in this case, that Octavia Gannard and Tuskena Gannard, who were non-resident minors, were not properly before the court; and the ground relied upon to sustain the objection is, that it does not appear, that in the publication which was made, there was any abstract of the contents of the bill, pursuant to Rule 17, Clay's Dig. 614, and the statute of 1845, Acts, p. 18.

The *insufficiency* of the brief of the bill, which the rule requires to accompany the order of publication, or even its *entire omission*, cannot be urged for the first time in this court. McGowan v. Branch Bank of Mobile, 7 Ala. Rep. 823; Cowart v. Harrod, 12 Ala. 265.

They answered by *guardians ad litem* regularly appointed, and it sufficiently appears that their interests were protected.

The objection, that there is a misjoinder of complainants, we consider untenable. All three of the complainants held separate portions of the land sold by Gannard originally to Eslava, with warranty, and by him resold to the other two with warranty. If Eslava was a creditor, by reason of the covenant of warranty in Gannard's deed, so, likewise, were the other two, who purchased with covenant of warranty from Eslava, and were, with him, ousted by title paramount to that of Gannard. They all had the right to look to Gannard for indemnity, by suit on his covenant, and any cause which would authorize one to go into a court of equity as a creditor, would equally permit him to join the others, or the others to join him. This is for the benefit of Gannard, and all concerned, to avoid multiplicity of suits, one of the beneficent

objects of chancery jurisdiction. Although the complainants are many, the relief sought is, as far as respects the defendants, one in character. Brown v. Bates, 10 Ala. Rep. 432; Story Eq. Pl. § 99, *et seq.*

Where all the creditors have a common interest, as here, in all the objects of the bill, they may sue jointly. Story Eq. Pl. § 104.

This brings us to the two main questions in the case:

1. Does the covenant of warranty, in the deed of Gannard to Eslava of 3d October, 1835, make him a debtor as of that date to Eslava, and to purchasers with warranty from Eslava, who have been ousted by title paramount to that of Gannard?

2. Will a voluntary conveyance be treated as void under the statute of frauds against an existing creditor, even in the absence of actual fraud?

Upon the first of these points, we think it clear, both from reason and on authority, that the covenantee in a deed for land, containing a general covenant of warranty, is a "*creditor*" of the covenantor from the making of the deed, within the meaning of the statute of frauds, (Clay's Dig. 254, § 2,) in all cases where there is a paramount outstanding title, by which he may be or actually is afterwards evicted. The debt created by such a deed from the warrantor to the warrantee, differs in no essential particular from the debt created by a bond with condition. In both cases it is "*debitum in præsenti, solvendum in futuro*" upon a contingency. The deed is in substance but a bond for the purchase money, with the condition that the penalty of the bond shall be paid if the grantee be evicted, or that the grantor shall refund to the grantee whatever sum it may become necessary for him to pay out, in the purchase of a paramount outstanding title, to save himself from such eviction. Under the second section of the statute of frauds, any one is a creditor, who has a right by law to demand, either presently, or upon some future contingency, the fulfillment of any obligation or contract. To give the statute a less extensive meaning, would be to destroy its chief excellence.

Roberts on Frauds 459, says; "It cannot be said, that an obligor in a bond, before the pecuniary demand arises by the

forfeiture, can be ignorant of his liability or danger, so as to exempt him from the imputation of fraudulent intent upon this statute of Elizabeth. And, indeed, if the construction of this statute can properly be influenced by technical reasoning, it may be remarked, that there is a present debt existing at law immediately upon the execution of the bond, the condition being a condition subsequent only, and operating merely upon the remedy, without in any manner changing, diminishing, or qualifying the debt itself."

Sutherland, J., in Jackson v. Seward, 5 Cowen, 71, says: "The question of creditor or not cannot turn on the ground of *contingent* liability, when considering this act, (statute of frauds). If it should, all endorsers and sureties would be deprived of its protection."

It is argued, that the English statute and the New York statute contain the words, "creditors and *others*," and that our statute contains the word *creditors* only: and that therefore the English and New York cases upon this point rest on a broader basis than our statute. In cases where the effort was to set aside voluntary conveyances, as fraudulent, when they were made pending actions for *torts* against the makers, and before judgment recovered, and in some other cases, some stress seems to have been laid on the words, "*and others*." Jackson v. Myers, 18 John. 427; Lewkner v. Freeman, Prec. in Ch. 105; 3 Coke, 82; Taylor v. Jones, 2 Atkins, 600.

In commenting on the case in 2 Atkins, Taylor v. Jones, Mr. Lomax, in his Digest, Vol. 2, 341, uses this language: "The omission of these words, "*and others*," in the act of assembly of Virginia, has not, however, according to the generally received impressions of the legal profession, varied the construction of the statute in this particular. We have in our act retained that expression of the statute of Elizabeth which is equally comprehensive: "the person or persons, &c., whose debts, suits, demands, &c., shall be disturbed," &c. The same remark will apply to the statute of Alabama, which is an exact copy of the Virginia statute. Besides, it will be found, that both the English and New York cases expressly decide, that a person whose debt was at first *contingent*, is not the less a *creditor*, according to the statute, on that account; the word *others* is not invoked in aid of such. Roberts on F. 459; 5

Cowen, 71; East India Co. v. Clavel, Prec. in Ch. 377; 10 Vesey, 360; 4 Greenleaf, 195.

Many authorities are cited by the counsel for the plaintiffs in error, to show that the word *creditors*, as contained in our registration acts, (Clay's Dig. 256, § 5; ib. 502, § 2), and our act "*to prevent the sacrifice of real estate*," (Clay's Dig. 194, § 10), is construed to mean *judgment creditors;* and that the same word, as used in the bankrupt acts of England, is held not to extend to creditors whose debts are *contingent.* This is all true; but the same reasoning which would uphold such a construction of the word in these statutes, would forbid it when we come to consider the great object of the statute of frauds, namely, the prevention of every sort of dishonest contrivance to defraud any and every kind of honest creditor. Although ordinarily none other than *judgment creditors* can proceed in equity, to set aside a conveyance void for fraud, yet the idea has never received countenance from any quarter, that a person must be a judgment creditor, before a deed can be concocted against him that shall be fraudulent and void as to his debt.

We take it, therefore, to be sound law, that a covenantee in a deed with general warranty, is a *creditor*, within the meaning of the statute of frauds, at the date of the deed, whenever there is then existing an outstanding paramount title to that of his covenantor; in other words, that a liability, though *contingent*, is an *existing debt*, in view of the statute of frauds.

This brings us to the question, whether a voluntary conveyance is good, in any case, against an existing creditor; or, can a man who owes a debt make a transfer of his property to his wife and children, from natural love and affection, which shall make such property no longer liable for that debt?

The doctrine was laid down explicitly for a long time, by a number of very eminent English judges and chancellors, that such a thing could not be done.

Lord Hardwicke, in Townsend v. Windham, 2 Vesey, 10, uses this language; "I know no case on the 13th Eliz. where *a man, indebted at the time*, makes a voluntary conveyance to a child, and dies indebted, but that it shall be considered a

part of his estate, for the benefit of his creditors." Roberts on F. 24.

Mr. Roberts, in his admirable treatise on the statutes of frauds, observes; "It is worthy of remark, that the whole strain of Lord Coke's reasoning in the last mentioned case, (Twyne's case, the great leading case on this subject), shows it to be his opinion, that the statute 13 Eliz. should be so construed, as to make it substantially operative to the benefit and protection of *bona fide creditors;* insomuch that a motive abstractly good and moral shall, by the presumption arising upon this statute, be *intended* fraudulent, whenever the grantor stands *indebted at the time*, against his *bona fide* creditors." Roberts on F. 449.

The plain and simple rule then prevailed, that, as to *existing* creditors, every mere voluntary conveyance was void, without respect to the motive with which it was made; and that as to *subsequent* creditors, it would be held void, or not, according to the actual intent with which it was made, to be gathered from all the surrounding circumstances.

This rule became relaxed in England, so far as to leave the *actual intent* to govern, as to the validity of voluntary conveyances, *in all cases*, and thus have been introduced many nice distinctions and perplexing inquiries. The same relaxation of the old rule has been followed by many of the courts of this country, and, among others, by the Supreme Court of the United States, and is countenanced by eminent law writers. This whole subject, and the authorities which relate to it, have been lately examined with care by my brother Chilton, in the case of Foote & Wife v. Cobb, 18 Ala. Rep. 585; and I refer to his opinion, as an able vindication of the correctness of the rule. That opinion, and the opinion of Chief Justice Saffold, in the case of Miller v. Thompson, 3 Porter, 196, in which the law was first settled this way in this state, will be found together to contain a full exposition of the authorities on this subject, and to them I refer.

One only suggestion of my own. Those who discard the old rule, urge strongly the claims of wives and children for whom provision has been made in good faith, against those creditors who have allowed their debts to become old and stale. Against such generally, it may be remarked, the sta-

tute of limitations is, and was intended to be, an ample protection for wives and children and every one else. But what will those who are influenced by their sympathy for wives and children, do with cases like the present, where the liability of the settlor is a contingent liability, and the debt of the creditor is a contingent debt, dependent upon the condition of a bond or the covenant in a deed. The debtor may be beggared by a forfeited bond or a broken covenant, years and years after its execution, without a shadow of blame on his part, and shall he remain so, while the wife and children of his covenantor live, perhaps, in ease and affluence, upon the mere bounty of the man who has all along been bound in law and conscience to make good his losses?

It only remains to apply these principles to the facts of the case.

We are quite pursuaded, by the testimony in the cause, that Dr. Gannard, at the time he transferred the fifty shares of stock in the Merchants' Insurance Company of Mobile, to his wife and children, did not intend to commit a fraud upon his creditors. We have no question but that he was governed by correct motives in what he did. He was then a man of ample fortune; the witnesses say, he was worth a hundred thousand dollars, or thereabouts, and free from debt, and nothing was more reasonable and proper than that he should make a provision and advancement not more extensive than this for his wife and children. There is some proof that he left Mobile clandestinely, after making sale of all his property, and that he did so to avoid suits that were threatened by his first wife's relations. This proof we think is satisfactorily repelled. We find no actual fraud, in the transfer of stock to his wife and children.

There is proof, that previous to the deed to Eslava, Dr. Gannard held in the Bank of Mobile seventy shares of stock; of this, six shares were in the name of his wife, Susanna Gannard, nine in his name as trustee for his wife, and twelve shares he held as trustee for his children, Octavia Gannard and Tuskena Gannard, six for each. On the 7th May, 1836, a little over seven months after the date of his deed to Eslava, Dr. Gannard sold at public auction these seventy shares of stock in the Bank of Mobile, at one hundred and twenty-five

dollars the share, and on the *same day*, 7th May 1836, he transferred fifty shares of stock which he had held since 1834, in the Merchants' Insurance Company of Mobile, to his wife and children, thus: sixteen shares to his daughter Octavia; sixteen to his son Tuskena, and eighteen to his wife, Susanna Gannard. The dividends on this stock from 1836 to 1850, were drawn by Guesnard and Lopez, as the attorneys of the holders.

The proof is, that at the time of this transfer, the stock of the Merchants' Insurance Company was ranging from ninety dollars to par.

So far as respects the stock held in the name of Mrs. Gannard, we are all of opinion, that although a gift from her husband to her separate use, which would hold good as against his representatives, it is nevertheless one which he may resume at any time during his life, and which will consequently be held subject to the claims of creditors. 5 Metcalf, 280; 2 Story's Rep. 316.

As respects the stock transferred to the children, in the Merchants' Insurance Company of Mobile, my own mind is convinced from the proof, that this was, to the extent of the funds realized from the sale of the stock of the children in the Bank of Mobile, only a re-investment for their benefit, and should be so held. That it was not an original gift from their father, as of that date, and therefore subject to the claim of Eslava as pre-existing; but that it was a purchase with their money, which it will be their right hereafter to pursue and recover, if it is taken from them in this proceeding, unless they elect to proceed against the Bank of Mobile for the original stock in that bank. My brethren differ from me on the force of the proof to this point, and holding the transfer of Merchants' Insurance Company stock to be a gift as of that date, and not an investment of the money of the children, agree in condeming this stock likewise to the satisfaction of the claims of creditors.

It only remains to add, that the decree of the court below is affirmed.

We have been requested by the counsel for plaintiffs in error, to reconsider the decision of this court in the case of Baker et al. v. The Heirs of Chastang, 18 Ala. 417, on two points:

1. That a married woman cannot, by virtue of the statute of this State, (Clay's Dig. 596, § 1,) make a valid will of real estate;

2. That the admitting of such a will to probate, by the Orphans' Court, is not conclusive of the right of a married woman to devise her real estate, and that the heir, notwithstanding the probate of the will, may deny its efficacy as a muniment of title, as against his title by descent.

The contrary propositions were relied on in that action to make good the deed of Gannard to Eslava, as against the heirs of the first Mrs. Gannard, who was a Chastang, and who devised to her husband the real estate in controversy in that suit, and whose will was probated by the Orphans' Court of Mobile.

Agreeably to the request of the counsel, we have carefully reconsidered the decision in that case, on the points in question, and are fully satisfied with that decision, and deem it needless to do more than refer to the reasoning and authorities of the opinion in that case, as conclusive of the same points presented by the answer of the defendants in this case.

DESHA & SHEPPARD *vs.* SMITH.

1. The law will not, in the absence of an express stipulation between the parties, compel one partner to pay interest to his co-partners on the amount by which their capital exceeds his.
2. But partners may enter into such stipulations respecting the division of the profits, or the advantages which each is to derive therefrom, as they may see fit, unless their pretended contract is a mere device or cover for usury; and such contract, being legal, would form the rule by which the rights of each, in the settlement of their joint affairs, would be ascertained and adjusted.
3. The books of a firm, to which all the partners have had free access, are evidence for and against each partner, in settling the partnership accounts; and the entries therein must be considered at least *prima facie* correct.
4. When the partnership accounts have been made out and settled after full deliberation, it requires clear and convincing proof of error, and further that this error was unknown at the time of the settlement to the party complaining, to induce a court of equity to open the account.
5. If the evidence leaves the mind in doubt whether there is error or not, the

court must decide against the existence of error, the burthen of proof resting upon him who complains of errors in a stated account.

ERROR to the Chancery Court of Mobile.

Tried before the Hon. J. W. Lesesne.

This bill was filed by Murray F. Smith against his late partners Robert Desha and John F. Sheppard, for the purpose of correcting certain alleged errors in the settlement of the partnership accounts. The bill alleges that on the 1st October, 1841, complainant was admitted a partner in the firm of Desha, Sheppard & Co.; that he did not converse with Sheppard in relation to the partnership, but Desha informed him that the firm had been formed, and "that he was a partner on equal terms with the others;" that there were no articles of association, and no discussions between parties as to the terms; that the firm was dissolved in April, 1845, by the withdrawal of Sheppard, and the accounts were made up for settlement under the direction of Sheppard, who had the principal charge of the books of the firm; that the business was continued by Desha and Smith, under the firm name of Desha, Smith & Co. until April, 1847, when the firm was dissolved by the act of Desha; that no change took place, at the formation of the new firm, in the relation of the partners, but Desha successfully asserted his right to Sheppard's interest in the firm, and the partnership of Desha, Smith & Co., was settled on that basis.

The alleged error consists in the principle on which interest was calculated among the partners, Smith being charged with interest in favor of both Desha and Sheppard, on the amount by which their capital exceeded his. The complainant alleges that his attention was first drawn to this error in 1847, on the settlement of the accounts of Desha, Smith & Co., at which time the subject was discussed between him and Desha, and the error was admitted and corrected in their settlement. The book-keeper of Desha, Sheppard & Co. continued to act in the same capacity for Desha, Smith & Co., and had carried the same error into their books. After the settlement of the affairs of Desha, Smith & Co., complainant examed the books of Desha, Sheppard & Co., and did not ascertain the true condition of the accounts until the latter part of

the year 1848, and he then notified Desha and Sheppard of the existence of the errors.

The answers of Desha and Sheppard admit that the partnership of Desha, Sheppard & Co., was formed without any conversation having taken place between Sheppard and Smith, and that Smith was to receive one third of the profits; but they insist that it was agreed between them, that Smith should pay interest to each one of them on the amount by which their capital exceeded his, and interest was charged against him accordingly. They also rely, by way of plea in bar, upon the stated accounts and settlements of the partnership affairs.

It is unnecessary to give a detailed statement of the evidence. The Chancellor deemed it sufficient to support the bill, and rendered a decree in favor of the complainant; and his decree is now assigned for error.

HOPKINS and STEWART, for plaintiffs in error.

CAMPBELL and PHILLIPS, *contra.*

DARGAN, C. J.—Robert Desha and John F. Sheppard previous to the first of October, 1841, were partners in trade, and carried on a factorage and commission business in the city of Mobile. On that day they admitted Murray F. Smith as a member of the firm, and the business was conducted under the name and style of Desha, Sheppard & Co. In the latter part of April, 1845, the firm was dissolved by the withdrawal of Sheppard, and the accounts between the partners were made out and settled. Desha and Smith then formed a new firm under the name of Desha, Smith & Co., and continued the same business, but Sheppard had no interest in this latter firm. Murray F. Smith, the complainant, now files his bill impeaching the account between Desha, Sheppard and himself for errors. The bill specifies the errors, which consist, as it is alleged, in several entries against Smith in favor of both Desha and Sheppard, by which Smith is made to pay to *both his partners, interest at the rate of eight per cent annually,* upon all the capital both had in the firm, over and above the amount furnished by Smith; thus, on the first day of October, 1842, he was charged with interest in favor of Sheppard to

the amount of $1851 $\frac{98}{100}$, which would be the amount of interest that the capital furnished, over and above the amount furnished by Smith, would yield, if it had been loaned to a stranger and not employed by the firm; and on the first of October of each succeeding year, Smith was charged with interest upon the same principle, in favor of Desha and Sheppard. Thus, Smith was charged with interest annually, at the rate of eight per cent., upon all the capital each of the other two partners had in the firm, above the amount furnished by Smith. The bill alleges that the complainant was admitted as a member of the firm upon terms of equality, and that this mode of computing interest in favor of his partners violates this principle of equality.

The answers of both defendants admit, that the complainant was admitted as a partner of their firm at the time stated in the bill, and also admit that he was to receive one third of the profits, and was entitled to equal control as a partner in the management of the business; but they deny that there is error in those charges, and insist that it was one of the terms of the agreement by which Smith was admitted as a partner, that he should pay interest to his partners in the manner in which it was charged in their books, and in the account current between them, which was settled in April, 1845; and they insist upon this stated account, as a bar to the relief sought by the bill.

From this summary statement of the case, it is apparent that the main question, touching the merits of the controversy, is, to ascertain the terms of the partnership between Desha, Sheppard and Smith; for it is too clear to admit of argument, that if they were equal partners, and there was no stipulation in the partnership agreement, that Smith should pay them interest in the manner in which he was charged therewith, there would then be errors in the account; for Smith is made to pay the entire interest on capital used for the mutual benefit of the firm. This the law would not compel him to do, in the absence of a stipulation to that effect. But I think it is also equally clear, that if by the terms of the partnership, Smith agreed to pay his partners interest in the manner in which he was charged, then there is no error in the accounts, and he has not been improperly or illegally charged with in-

terest. Partners may enter into such stipulations respecting the division of the profits, or the advantages that each is to derive therefrom, as they see fit, (unless indeed their pretended contract was a mere device or cover for usury;) and such contract being legal would form the rule, by *which the rights* of each, in the settlement of the joint affairs would be ascertained and adjusted: Coll. on Partnership, 54; Story on Partnership, 28 § 23. We must, therefore, look to the pleadings and evidence, for the purpose of ascertaining whether Smith agreed, upon becoming a member of the firm, to pay his copartners interest in the manner he was charged therewith in the account which he settled. The contract of partnership between the complainant and the defendants was not reduced to writing, and it is admitted by the bill, as well as in the answer of Sheppard, that the terms upon which Smith became a member of the firm were not discussed between him and Sheppard, and the answer of Desha in substance denies that the complainant became a partner upon any other terms, than those indicated by the account. He states that the terms of the partnership were agreed upon by Sheppard and himself; which were, that the profits were to be equally divided between the three parties, but that the complainant was to pay individually, to both Desha and Sheppard, interest annually at the rate of eight per cent., for any excess of capital both or either had or might have at any time, in the firm, above the amount that might be furnished by the complainant, and that these were the only terms ever proposed by Desha t› complainant, and that he accepted them. The answer of Sheppard also insists, that these were the terms on which the complainant became a member of the firm of Desha, Sheppard & Co. In support of the answers, and to disprove errors in the accounts, the defendants mainly rely upon the entries contained in their books, by which the complainant was charged with interest conformably to the view of the partnership agreement as contained in their answers, and also, upon the fact, that upon the dissolution of the firm by the withdrawal of Sheppard, the accounts between the partners were examined by Smith, the complainant, and by him settled without objections. It also appears, that these entries were made in the books of the firm about the time they repectively

bear date, and that Smith had free access to the books of the firm, though they were more particularly under the charge of Sheppard than of any other member of the firm.

It is a well established principle, that entries in the books of a firm, to which all the members have had free access, are evidence for and against each partner in settling the partnership accounts; such entries, at the least, must be considered as *prima facie* correct: Heart v. Corning, 3 Paige 566; 7 ib. 483; Allen v. Coit, 6 Hill 318; Millandon & Son v. Sylvester, 8 La. R. 262–268; 11 Con. En. Ch. R. 269; Coll. on Partnership, Perkins' Ed., Note 1. But when the accounts between the partners have been made out and settled after full deliberation, they become much more stringent proof of their correctness; for the settlement shows the assent of the mind, after an examination of the accounts, that they are correct, and consequently that there is no false or erroneous charge contained in them; and it requires clear and convincing proof of error, and further that this error was unknown to the party at time of the settlement, to induce a court of equity to open the account thus settled. All the authorities agree, that the burthen of proof lies on him who complains of errors in a stated account, and errors which he does not clearly establish cannot be presumed to exist: Chappedilane v. Dechenaux, 4 Cranch 306; Wilde v. Jenkins, 4 Paige 481; Langdon v. Roane, adm'r., 6 Ala. 518, and cases there cited. Hence, if the evidence leaves the mind in doubt whether there is error or not, the court must decide against the existence of the error. In the language of Ch. Justice Marshall, "no practice could be more dangerous, than that of opening accounts which the parties themselves have adjusted, supported by probable or doubtful testimony."

Relying on this rule of law, a majority of the court, after a full and deliberate examination of all the evidence, and the circumstances connected with this cause, have come to the conclusion, that the testimony does not establish errors in the account; they think that, at the most, it only creates a doubt whether, by the terms of the partnership agreement, Smith was to pay his partners interest in the manner in which he was charged, and that testimony which only renders it doubtful whether the account is erroneous or not, is insufficient to open it, especially after it has been settled and paid.

For myself, however, I must say, that though I fully agree with the court on all the principles of law that have guided them to their conclusion of fact, yet, weighing the evidence and the circumstances connected with the cause, my mind is forced to a different conclusion, and I can but believe that the evidence clearly establishes errors, and that the complainant was not apprized of their existence at the time the account was settled and paid. I, however, do not deem it necessary to enter into an argument upon the facts, to show the train of reasoning that has led me to this conclusion; it could not influence the court, for we have deliberately discussed and weighed all the evidence; it could not benefit the parties in interest, nor be of use to any one; it could only extend this opinion unnecessarily, and this I am not disposed to do. It is sufficient to say, that as a majority of the court are satisfied, that the evidence does not clearly show errors in the account, the decree must be reversed and the bill dismissed; and this renders it unnecessary to examine any other question raised in the argument.

June 8.—This cause has been re-argued since the organization of the court with five Judges, and a majority of the court adhere to the decision delivered at the previous term. We all agree on the principles of law announced in the opinion, and a majority think the evidence insufficient clearly to establish error in the account. For myself, however, I still remain of the same opinion, and think the complainant entitled to relief upon the facts established by the pleadings and proof, and my brother Goldthwaite concurs with me.

Let the decree of the Chancellor be reversed, and the bill here dismissed.

PAULDING *vs.* LEE AND IVEY.

1. *It seems*, that the eighth section of the bankrupt act of August 19, 1841, provides a general limitation which is alike applicable to suits for the recovery of specific property and choses in action, and is not confined in its operation to suits for the recovery of property in which the defendant sets up an adverse

claim. (*Per* Dargan, C. J., and Chilton, J., the other Judges expressing no opinion.)

2. It is a general rule in equity that relief cannot be granted upon matters which are not alleged in the bill, although they may be proved, and that every material allegation must be put in issue by the pleadings. The decree must be predicated upon *the allegations and the proof*, between which there must be a substantial conformity.

3. Where a bill is filed to enforce an express trust, alleged to have been created by the agreement of the defendant to receive and collect claims, *for the security of a demand due the firm of R., S. & Co.*, proof of an agreement made by the debtor of R., S. & Co. with the defendant, that the latter should receive and collect certain claims, and should pay the proceeds *either to the debtor himself, or to three firms of which R., S. & Co. was one*, does not sustain the allegations of the bill.

ERROR to the Chancery Court of Perry.

Tried before the Hon. W. W. Mason.

This was a bill filed by William K. Paulding, and it alleges that he is the owner of a receipt given by the defendant Lee, as an attorney at law, to Ross, Strong & Co., for certain demands due to said firm from Goodwin & Ivey, which receipt had been sold at a bankrupt sale by the assignee as a portion of the assets of Ross, Strong & Co. It is averred, that in July, 1834, an agreement was entered into between Jno. M. Ross, Silas Ivey and Lee, by which Ross, Strong & Co. were to leave their said demands against Goodwin & Ivey in the hands of Lee, as an attorney at law, for collection, and that Goodwin & Ivey should turn over to Lee notes on solvent persons residing in the neighborhood (their solvency to be judged of by Lee) sufficient in amount to pay off and discharge the demands so left by R., S. & Co. That this agreement was carried out—the notes were left with Lee, who proceeded to collect them, and has derived therefrom money sufficient to pay the demands mentioned in his receipt, but that he has failed to pay it over, or to give any list of the claims so deposited with him, and has fraudulently combined with Ivey, to convert the fund so raised from the collaterals to their own use, withholding from R., S. & Co. all information as to what he has done with the same. That Lee pretends that he has collected nothing from the claims, that they were insolvent; whereas the complainant avers they were good, and that enough of them were collected to pay the demands of R., S. & Co.

That said Lee was guilty of gross negligence and fraud, in failing to commence suit against Goodwin & Ivey, and failed to sue on the same until the spring of 1836. That Ivey had real and personal property sufficient to pay double the amount of said debts, which property Lee aided him in disposing of privately, and in removing to Mississippi portions of the personal property, with a view of defrauding R., S. & Co.

That Goodwin & Ivey pretend to have obtained a discharge under the bankrupt act of 19th August, 1841, but the discharge is fraudulent, by reason of the wilful and fraudulent refusal on the part of Ivey to surrender certain articles of property which are described in the bill. That the receipt of Lee to R., S. & Co., was sold by the assignee in bankruptcy in 1840.

This bill was filed on the 18th February, 1847. Lee and Ivey are both made defendants, and the prayer is for a discovery, and that they may be decreed to pay what has been received or collected from the collaterals, and such other sum or sums as might have been collected but for the fraud and negligence of the defendants; also, that the discharge of Ivey in bankruptcy be set aside and annulled.

Lee and Ivey both answer, and deny that any such agreement as that set up in the bill was ever entered into, or that any notes were ever deposited by Ivey, for the firm of which he was a member, with Lee, for the benefit of Ross, Strong & Co., as charged.

Lee states, in his answer, that he was the attorney at law for Goodwin & Ivey, and had received from them, for collection, certain notes, for which he had given no receipt; that afterwards Ivey procured from him a receipt for said notes, specifying that when collected, the proceeds should be paid to said Goodwin & Ivey, *or* to the payment of certain claims in Lee's hands for collection in favor of Turner & Lewis, Ross, Strong & Co., and Mott & Thompson; that these notes were sued upon in the name of Ross, Strong & Co.; one hundred and seventy-seven $\frac{73}{100}$ dollars only have been collected from them, fifty-five of which he has paid to Messrs. Turner & Lewis, and has their receipt therefor; he denies all combination with Ivey to defraud R., S. & Co., and avers that he

never refused to account or furnish information when called on; he insists that he has been guilty of no negligence or bad faith, but on the contrary, that he has fully discharged his duty as an attorney, both in respect to the notes left with him by Ross, Strong & Co., and those deposited by Ivey & Goodwin as above stated; he claims the benefit of the statute of limitations, and demurs generally to the complainant's bill.

The answer of Ivey substantially corresponds with that of Lee, respecting the notes transferred to the latter by the firm of Goodwin & Ivey; admits that he promised one of the members of the firm of R., S. & Co. to hand over to Lee notes and accounts to a large amount, for the use and benefit of R., S. & Co., Mott & Thompson, Turner & Lewis, and Jack F. Ross, but that Ivey & Goodwin never complied with this promise, and determined to make another arrangement with said effects. Said Ivey insists on the validity of his bankrupt certificate of discharge, and demurs to the bill.

Numerous witnesses were examined, and so much of their testimony as is important to be considered may be thus stated:

Norflett Goodwin, the late partner of Ivey, says, that said late firm was indebted to R., S. & Co. in the sum of about $2000 in 1833–4; that in the spring of 1834, the firm being in failing circumstances, it was agreed between him and Ivey that they should effect a compromise with their creditors, among whom were R., S. & Co.; that Lee was employed to aid them in this matter, and agreed to take their notes and accounts, an inventory of which was made out upon their ledger, amounting to eleven or twelve thousand dollars, many of which were good. He states there was no written agreement in regard to the compromise, and recollects no pledges of Lee, other than as an attorney at law, to collect the claims so placed in his hands so far and as fast as he could, for the benefit of the creditors. "That the understanding between all the parties, viz: Ross, Strong & Co., Jack F. Ross, Turner & Lewis, Mott & Thompson, and John M. Mott, and the firm of Ivey & Goodwin was, that if none of the other creditors of the firm than those named should come into the arrangement, then those already named should derive the whole benefit of it; that Lee, the attorney for the firm, should take the books, papers,

&c., of the concern, do the best he could with them, and get a full release from all the creditors above named in favor of said Ivey & Goodwin;" that before the claims of R., S. & Co. were sent up, the firm of Ivey & Goodwin had employed said Lee as their attorney, and had paid him the sum of $200, but had not delivered over to him their claims. Witness also states, that finding on his return from North Carolina in 1835 that Lee had brought suit against the firm of Ivey & Goodwin in favor of R., S. & Co. and others, he inquired of him how he, being the attorney of Ivey & Goodwin in the matter, could bring suits against them in favor of the creditors of said firms above named, and was informed by Lee that the suit or suits had been brought by Ivey's consent, and that it would be to the advantage of Ivey & Goodwin.

John W. Mott states, that being informed by J. M. Ross at Ivey & Goodwin's store that R., S. & Co. were leaving their claims with Lee for collection, and that Goodwin & Ivey had agreed to deposit claims with Lee to be collected for their benefit, he left his claim with said Lee, taking his receipt, with the understanding that it should be similarly secured; that he has called since on him to learn the condition of the claim, and has uniformly been informed that nothing has been derived from the assets placed in his hands.

John Mc D. Ross deposes, that in July, 1834, he, being a member of the firm of R., S. & Co., placed the demands of said firm against Ivey & Goodwin, amounting to $2000, in the hands of C. W. Lee, for collection, as an attorney at law; that Lee informed him he had received from I. & G. claims on different individuals, sufficient to secure the amount of their indebtedness to R., S. & Co.; that Ivey & Goodwin made an assignment, and applied to their creditors, of whom R., S. & Co. were among the number, and proposed the conditions of the assignment should be acceded to on or before the 28th or 29th July, 1834; that on the 19th of said month, witness proposed to Ivey & Goodwin that he would leave his claims with said Lee, to whom they promised, if the creditors should not perfect the assignment by consenting to it by the 29th July, 1834, they (I. & G.) would place in the hands of said Lee good and solvent notes in said county, and known to said Lee to be good, sufficient to pay the indebtedness of I. &

G. to Ross, Strong & Co.; that he afterwards called upon Lee to pay the amount collected, but was informed by him he had not collected enough to pay the cost.

Thomas Strong says, his understanding was, that all the claims placed by I. & G. in Lee's hands, were for the benefit of R. S. & Co. and Jack F. Ross; that he called on said Lee in the summer of 1838, for settlement, but was answered by him that Ivey & Goodwin had made collections of all the good debts, and he had nothing left for R. S. & Co.; that he frequently wrote him on the subject, but received no answers.

Clinton Ford proves, that he was the book keeper of Jack F. Ross; that in 1833, Goodwin & Ivey were indebted to said Ross in the sum of six thousand dollars, which, so far as the books of said firm disclosed, remains unpaid. He exhibits a letter written by the defendant Lee to J. F. Ross, dated 24th March, 1835, asking for advice, whether he should accept security of I. & G., in discharge of their indebtedness, to the amount of twenty-five hundred dollars, or whether he should refuse this, and contend for the full amount of the claims, the collection of which depended, in his opinion, upon the contingency, as to whether Goodwin did not remove his property from the State; stating also, that he was unable to say what amount would be finally realized upon the notes Goodwin & Ivey had delivered to him; that many of them were valueless.

This witness also exhibits a letter from Ivey to J. F. Ross, dated on the same day with that from Lee, stating that Goodwin had pocketed the funds which should have gone to the payment of the debts; that Lee was pressing the claims against the firm, in order to subject certain slaves in Goodwin's possession, to their payment; that the proceeds of these, with what he can collect from the notes left with him, will render the creditors of the firm tolerable secure.

The depositions of Ivey and Brown fully sustain the answers; that of Ivey is attacked by several witnesses, who prove his general character, such as to render him unworthy of credit, while on the other hand, a larger number prove him to be a man of good reputation for truth and veracity.

The record contains much proof, showing payments made to Lee on certain notes placed in his hands by Ivey & Good-

win, and some of them sued on in the name of Ross, Strong & Co.

It appears also, that the receipt given by Lee to Ross, Strong & Co., embraced claims amounting to seventeen hundred and sixty-six dollars, and was purchased at the bankrupt sale, by one Livingston, and by him transferred, without recourse, to the complainant, on the 16th May, 1845.

The complainant also read the answer of the defendant Lee, made to a previous bill, in which he admits the receipt of certain claims for the sole benefit of Ross, Strong & Co.; but this is noticed in the present answer, and stated to be a mistake, which subsequent investigation, and a conference with Ivey, to whom a receipt was given for the claims, enables the defendant Lee to set right.

The Chancellor, upon a full hearing on bill, answers, exhibits and proof, dismissed the bill, and his decree is here assigned for error.

GARROTT and SEWALL, for plaintiff in error:

I. Ivey was an incompetent witness for his co-defendant, because,

1. He was a party to the suit, directly interested in the event of it, and at least liable for the cost. Allison v. Allison, 7 Dana, 90; Holman v. Bank of Norfolk, 12 Ala. 370.

2. He is charged in the bill as a *particeps fraudis*, colluding with his co-defendant to complainant's injury, &c. Whipple v. Lansing, 3 John. Ch. 612; Pope v. Andrews, 1 S. & M. Ch. 135; Eckford v. DeKay, 6 Paige, 565; Chambers v. Chalmers, 4 Gill & J. 420; Breedlove v. Stump, 3 Yerger, 257; Ormsby v. Bakewell, 7 Ham. 98.

3. Whether liable or not, he made an active defence, resisting complainant's claim, demurring to bill, examining witnesses and actively mixing in the litigation. And this alone would make him incompetent, even if he had disclaimed. Holman v. Bank of Norfolk, 12 Ala. 370.

II. The bill is not multifarious. It is single as to the subject matter and relief sought, and the defendants are directly connected with the subject matter, the one deriving from the other, and both colluding together in regard to it. Planters' and Merchants' Bank v. Walker, 7 Ala. 926; Watson v. Cox, 1

Ired. Ch. 389; Parish v. Sloan, 3 ib. 607; Vaun v. Harzch, 2 Dev. & Batt. Ch. 31; Wheeler v. Clinton Co. Bank, Harr. Ch. 449. Multifariousness is confined to cases where the case of each defendant is entirely distinct and separate in its subject matter from that of his co-defendants. Kennedy v. Kennedy, 2 Ala. 571; Pleasants v. Glasscock, 1 S. & M. Ch. 17; Wright v. Shelton, ib. 399. The court in this case can go on, and do complete justice between the parties before it, and without injury to the rights of any other persons. There is no proof sustaining the statement in the answer, that other persons have any interest in this controversy. Indeed, such statement is indefinite, and therefore it was not necessary to make them parties. Batre v. Auze, 5 Ala. 173. If Mott & Thompson, and others named in the answer, were proper parties, the failure to make them parties was no ground for dismissing the bill, unless upon being required to amend the complainant refuses to do so. Singleton v. Gayle, 8 Por. 270; Toulmin v. Hamilton, 7 Ala. 362; Hunt v. Wickliffe, 2 Por. 201; Thompson v. Clay, 1 J. J. Marsh. 413; Cooper v. Gunn, 4 B. Mon. 594. They were not proper parties. Dias v. Bonchaud, 10 Paige, 445; 2 Story Eq.

III. Chancery has jurisdiction in this case on the following grounds:

1. It is a trust, which the Court of Chancery will enforce. 2 Story Eq. p. 405, § 1041.

2. For account and discovery. 1 Story Eq. § 458.

3. Agency. Pendleton v. Wamburzie, 4 Cranch, 73; Post v. Kimberly, 9 John. 470–493; Mackenzie v. Johnston, 4 Madd. 374. Nor is it a bar to a bill in equity to enforce a trust, that an action at law for money had and received can be maintained. New York In. Co. v. Ronlet, 24 Wend. 505; 23 Pick. 148, 153.

IV. And the suit was properly brought in the name of the complainants; for a court of equity recognizes an assignment of a chose in action, and will enforce it in favor of the assignee. 2 Story Eq. § 1040, and same p. 392; ib. § 1057, and p. 424, § 1057, a. The complainant was not a volunteer, but a *bona fide* purchaser, for a valuable consideration; not of a mere right to bring a suit, but an actual chose in action, the evidence of which was in the possession of his assignor, and

was delivered to him. See references above. A thing in trust is a matter of alienation. 2 Story Eq. 974, a.

V. The limitation of two years, in the bankrupt act, is no bar to this suit; because,

1. By the terms of the act the limitation extends only to suits, "by or against such assignee, (the assignee in bankruptcy,) or by or against any person claiming an adverse interest, touching the property or rights of property, &c." 5 Stat. at Large, pp. 446–7, § 8. In this case, neither the assignee in bankruptcy, nor any one claiming an adverse interest, is suing. Hence, by the terms of the act, the limitation does not apply. Ex parte Christy, 3 How. 292, 311, 313. And that such is the proper construction is manifest from the tenth section of the act; and the court will not extend the terms of the act by implication or construction.

2. The repeal of the bankrupt act, (3d January, 1843,) was a repeal of this limitation of two years, and left the prescription where it was by the laws of the State. There was no saving in the repealing act of this two years, or of any provision in said act, except so far as to proceedings which were pending in said District Courts. The case then, as to limitation, falls within the rule laid down in Henry and Wife v. Thorpe, 14 Ala. 103; Nichols v. Haskins, 16 Ala. 619; Cox v. Davis, 17 Ala. 714; Piatt v. Vattier, 1 McLean, 146.

VI. The statute of limitations of six years is not a bar to this suit; because,

1. It is not sufficiently pleaded or relied on in the answer. The plea is, that as to the negligence charged, it took place more than six years before suit brought, and he "insists on the benefit thereof." The plea is no defence as to the money collected and withheld, or converted to his own use, which is the *gravamen* of the charge, but only to the negligence in not making the debt out of Ivey, which was but an incident of the abuse of the trust confided to him. Now, the rule is, "that every plea must rest the defence upon a single point creating of itself a bar to the suit." Goodrick v. Pendleton, 3 John. Ch. 384; Allen v. Randolph, 4 ib. 693; Meeker v. Marsh, Saxton, 198; Story Eq. Pl. p. 317, § 661.

2. If the statute applied and was well pleaded, it would not commence running until a demand and refusal. Lever v.

Lever, 1 Hill Ch. 62–67; McBroom v. The Governor, 6 Por. 32; Kidd v. King, 5 Ala. 84. Lee denies in his answer that any demand was made on him prior to the first suit; and in his answer to that suit he expressed his willingness to account, or arbitrate the matter. And in case of an agency or trust for the collection of money, the right to sue does not exist, and of course the statute of limitations does not commence running, until the money has been collected by the agent or trustee. Scott v. Osborne, 2 Munf. 413, 420. Lee states in his answer that he collected one claim in 1842, and no where states when he made any other collections. The acknowledgment of the liability in the answers of Lee, defeated the operation of the statute of limitations. 20 John. 576, 586.

3. Because Lee concealed his acts, and failed to give information. This was fraud, and a party cannot avail himself, in bar of claims prosecuted against him, of a lapse of time brought about by his own improper conduct. 2 Story Eq. § 1421, and n. 2, 3; Richardson v. Jones, 3 Gill & J. 153, 188; 1 Story Eq. §§ 207, 210, 219.

4. Because it is a case of direct, express trust, continuing and unexecuted, which is within the exclusive jurisdiction of the Court of Chancery, and such a trust is not within the statute of limitation. 2 Story Eq. §§ 962, 954; Proost v. Gratz, 6 Whea. 481, 487; Cook v. Williams, 1 Green. Ch. 209; Redwood v. Reddick, 4 Munf. 222; Kane v. Bloodgood, 7 John. Ch. 90; McNair v. Ragland, 1 Dev. Ch. 533: 2 Story Eq. §§ 1039, 1040, 1041. At least, until the trustee has openly refused to execute the trust and denied the title of the *cestui que trust*, or practiced a fraud which has been discovered, and then the statute will commence running only from the discovery or knowledge by the *cestui que trust* of such refusal, denial or fraud. Talbot v. Todd, 5 Dana, 190, and cases above cited; and as a bailment, the statute does not apply. Collier v. Poe, 1 Dev. Eq. 55; Story on Bailments, § 2; Pinkerston v. Brewster, 14 Ala. 315. This is not a case of concurrent remedies at law and in equity. There is no remedy at law. A discovery is necessary, also an account; it is a case of fraud, and a case of trust. If Lee has collected more than enough to pay one debt, the surplus belongs to Ivey. A

court of law could not adjudicate the rights of the parties. 2 Story Eq. p. 294, §§ 962, 964. A trust may be created and proved by parol, whether express or resulting, except as to real estate, which is within the statute of frauds. Lord v. Lowry, 1 Bail. Ch. 510; Martin v. Greer, 1 Geo. Dec. 109; 14 Maine, 281; 5 John. Ch. 1. Ivey's discharge as a bankrupt is no bar to the suit against him, for the decree of discharge is void, the court having no jurisdiction.

CLARKE & MOORE, *contra:*

I. The complainant's bill should have been dismissed:

1. Because it seeks relief as to two separate and distinct matters, against different persons, and prays for two separate and distinct decrees. In such a case, the court, of its own motion, will dismiss the bill. See 1 Story's E. P. § 231, note 1; Greenwood v. Churchhill, 1 Mylne & Keene, 546; 7 E. C. Rep. 163.

2. Because there was a remedy at law, if he had a remedy anywhere.

3. Because the bill shows that complainant has purchased a mere right to bring a suit in equity, for an alleged fraud; which is against public policy, and will not be encouraged by a court of chancery. 2 Story's Equity Jurisprudence, § 1040, G.

4. Because the bill shows, that no suit was instituted on the receipt, until after the lapse of more than two years from the decree in bankruptcy. See Bankrupt Act, § 8, 10; Comyges v. McCord, 11 Ala. Rep. 934; 13 ib. 388; 17 ib. 372; 18 ib. 250.

5. It was the duty of the assignee in bankruptcy to sue upon the receipt. Bankrupt Act, § 10.

II. The answer and evidence show a state of facts, that would prevent the complainant from proceeding without making Mott & Thompson, Turner & Davis, and Jack F. Ross, parties to the bill. The chancellor, in deciding the case, must pass upon the rights of these parties. This he could not do, unless they are properly before the court. Story's E. Jurisprudence, § 1526; Story's E. Pleading, §§ 72–73–74–75–76.

III. The court will not entertain this bill, because of the

staleness of the claim. 2 Story's Eq. Jurisprudence, § 1520, and notes; 9 Peters' 417; 1 Howard, 167–168; ib. 192–3; 3 Brown's Ch. Rep. 640.

IV. The bill charges an express and direct trust. The proof shows that there was no trust. The law never implies a trust, nor will the court presume one. Hill on Trustees, 144, note.

V. If there be a trust in this case, it must have been created by parol declarations; and to create a trust by parol declarations, the words must amount to a clear and explicit trust, and must point out the beneficiaries with certainty. Ib. 59.

VI. A trustee is one to whom the legal title to property is conveyed, for the use and benefit of others. 4 Kent, 305; Hill on Trustees.

VII. The proof shows, that the claims were placed in Lee's hands, as an attorney, and in no other capacity.

VIII. The defendant having denied all the material allegations in the bill, and the complainant having failed to sustain a single allegation, by even one witness, the chancellor was compelled to dismiss the bill; and more especially, when all the material matters in the answer are sustained by two witnesses.

IX. The small discrepancies in the answer of the defendant Lee may be readily accounted for, if we consider the great lapse of time which intervenes between the transaction and the date of the answer; and the further fact, that he kept no books; that many of the claims were small, many insolvent; and that he was attorney for Jack F. Ross, Ross, Strong, & Co., Turner & Lewis and Mott & Thompson, as shown by the proof.

X. The complainant is a mere speculator in bankrupt claims, and is not entitled to the tender consideration of the Court of Chancery, to enforce a pretended claim, which others were too conscientious to prosecute. 2 Story's Eq. Jur. § 440, note 5.

CHILTON, J.—Nearly thirteen years were allowed to pass between the time of giving this receipt by the defendant, Lee, and the period when he was called upon judicially to account

for the claims embraced in it, and the collaterals which, it is alleged, were turned over to him by Ivey & Goodwin, to secure their payment. It is, therefore, by no means surprising, that we should find much conflict in the pleadings, as well as the proof, consequent upon the imperfect hold which the memory usually has upon facts which have transpired so many years since. While, however, this consideration should induce the court to place the most charitable construction upon the testimony, attributing any apparent conflict rather to the frailty of the memory, than to any disposition willfully to pervert the truth; nevertheless, the burthen of making full proof, which is devolved upon the complainant, should not be lessened because by his delay he has rendered such proof more difficult to obtain.

The receipt, which is made the foundation of this suit, was sold and transferred, as appears by the written assignment endorsed upon it, by the assignee in bankruptcy, on the 14th May, 1843, and this bill was not filed until the 18th of February, 1847. The first question, therefore, which arises upon the demurrer, is, can this suit be maintained after the lapse of two years from the discharge in bankruptcy? To this I propose first addressing myself.

By the provisions of the bankrupt act of 19th August, 1841, the assignee was vested with all the rights, titles, powers, and authorities, to sell, manage, and dispose of the bankrupt's property and rights of property, as fully, to all intents and purposes, as if the same were vested in, or might have been exercised by the bankrupt, before or at the time of the bankruptcy.

Conceding that the right to dispose of this receipt vested in the assignee, and that the sale not only passed the receipt, but all liability which the maker of it had incurred, either by reason of collateral undertakings to secure the demands mentioned in it, or by negligence or fraud, we think it clear, that he could by his sale transfer no greater interest than could Ross, Strong & Co. before their bankruptcy. He may sell "as fully," says the act, as if the same were vested in, or might be exercised by the bankrupt, but he can do no more. The result is, that upon this hypothesis, he may by his sale transfer an equitable title to the chose in action—a right to

use the name of the assignee to recover in an action at law upon the receipt, for a violation of the contract evidenced by it, indemnifying him against the cost; or, if there be a remedy also in equity, then a right to file a bill, bringing the legal holder of the receipt before the court as a defendant, so as to estop him from afterwards asserting the legal title to the annoyance of the defendant, Lee.

We had occasion recently to consider this question, in the case of Camack v. Bisqua, 18 Ala. Rep. 286, in which we arrived at the conclusion above attained; and a re-examination of that case has failed to satisfy us, that the principle asserted by it is incorrect.

The legal right of action, if any exists, being in the assignee, could he maintain an action, after the expiration of the two years named in the eighth section of the bankrupt act? If he could not, and the legal title be barred, it is very clear that the title to equitable relief, dependent upon it, is also barred. Angel on Lim. 25; Hovenden v. Lord Annesley, 2 Sch. & Lefr. 329; 12 Peters' Rep. 56.

The eighth section of the bankrupt act provides, first, for conferring jurisdiction upon the Circuit Courts of the Union, concurrent with the District Courts in the same district, of all suits, both in law and in equity, which may be brought by the assignee of the bankrupt against any person or persons *claiming an adverse interest*, or by *such* person against such assignee, touching any property or rights of property of said bankrupt, transferrable to, or vested in such assignee; second, a limitation, not for the particular class of suits above mentioned only, but a general limitation, applicable to suits at law or in equity, *in any case*, and in *any court whatsoever*, in which such suits may be brought, either by or against the assignee, or by or against any person claiming an adverse interest, touching the property or rights of property of the bankrupt. This limitation is, two years after the declaration and decree of bankruptcy, or after the cause of suit shall have first accrued. It is quite reasonable to suppose, that Congress designed to provide a short statute of limitation to litigation arising out of the administration of bankrupts' estates. One object was, to speed the settlement of estates, all the proceedings in reference to which, the tenth section declares,

"shall be finally adjusted, settled, and brought to a close, in two years, if practicable." Another was, to make the law a measure of relief for the country in its then embarrassed condition, which relief would hardly have been secured by a release of the unfortunate debtor from his obligations, and at the same time subjecting all those having business connections with him to the most embarrassing litigation, until it should be terminated by the statutes of limitations of the several states.

These statutes are various in the different states; whereas the law, as contemplated by the constitution, was designed to operate uniformly. This uniformity could not result, in the absence of a uniform limitation, as applicable to suits to recover the bankrupt's effects.

Now, unless this limitation is found in the eighth section, above referred to, the act contains none, except as applicable to cases where *an adverse claim* is set up to property or rights of property of the bankrupt. Perhaps it would be difficult to find a substantial reason for prescribing a limitation to suits for the recovery of specific property, which would not equally apply to suits for the recovery of money, or for a breach of duty. Upon the whole, I am of opinion, that the framers of the law very reasonably supposed, that the country might labor under much embarrassment, from the numerous suits and protracted litigation consequent upon the purchase, in many cases at a very trifling cost, of doubtful claims; and it was to meet this, and provide a *general* limitation, as applicable to suits, not only where property was claimed adversely, but in any and every case, and in every court, that this provision was inserted.

This conclusion is not only sustained by reason and a just and proper analysis of the act itself, but by the former decisions of this court.

In Comegys v. McCord, 11 Ala. Rep. 932, which was an action of detinue for a receipt given to the bankrupt for notes, it does not appear what claim the defendant set up to the receipt, or whether it was *adverse* or otherwise. This inquiry was not deemed a matter of importance, and no point was made in the decision respecting it. The court, after referring to the latter part of the eighth section of the bankrupt

law, says: "The limitation is *general*, prohibiting suits by or against the assignee in any court after the lapse of two years," &c.

In Harris, Assignee, v. Collins & Cartright, 13 Ala. Rep. 388, we held the two years limitation applied to an action of debt, upon a lease reserving rent to the bankrupt. See also Archer v. Duval, 1 Branch's Rep. 219.

I am aware that a different construction has been placed upon this clause by the Supreme Court of Maine, in Carr v. Lord, 29 Maine, (16 Shep.) 21; but I feel satisfied that decision cannot be supported as a "correct exposition of the law upon this subject."

A similar decision has been made in Pennsylvenia, (Union Canal Company v. Woodside, 1 Jones' Rep. 176,) cited in 10 U. S. Dig. p. 62 § 10; but I have been unable to procure the volume containing it.

2. But if the foregoing position be erroneous, it is exceedingly clear this decree must be affirmed upon another ground. In McKinley v. Irvine, 13 Ala. Rep. 693, we said; "The general rule is, that relief cannot be granted upon matters not charged in the bill, although the same may appear in evidence; for the decree must be predicated upon the allegations, as well as upon the proof." And the reason for the rule is, that the defendant is entitled to be informed by the bill what the suggestions and allegations are, against which he is to prepare his defence. Story's Eq. Pl. § 257. The rule requires that every material allegation should be put in issue by the pleadings, so that the parties may be duly apprized of the essential inquiry, and may be enabled to collect testimony in order to meet it. James v. McKernon, 6 John. Rep. 564. See the cases referred to in McKinley v. Irvine, *supra.*

The equity of the bill in the case before us consists, not in the right which the complainant has to proceed against Lee for a breach of his obligation, as contained in the receipt, in failing to collect, or refusing to pay over, moneys upon the demands mentioned in said receipt; for this right could have been adequately asserted in the common law court, and constitutes no ground for a resort to a court of equity. Standifer v. McWhorter, 1 Stew. Rep. 532; Bibb v. McKinley, 9

Por. 636; Herring v. McEldery, 5 Por. 161. Neither does the fact, that the complainant has no right to proceed at law to recover the sums which he insists are due him from the defendant except in the name of the assignee in bankruptcy, confer jurisdiction upon the equity court. McGehee v. Dougherty, 10 Ala. Rep. 863.

But the true ground, and the only one upon which the bill may be successfully defended, is, that Lee, having received and receipted for the demands of Ross, Strong & Co., agreed with that firm, through one of its members, to receive good notes and accounts on solvent individuals in the neighborhood, of value sufficient, when collected, fully to pay off and discharge said claims of R. S. & Co.; that Ivey, in conformity to said agreement, placed in Lee's hands said notes and accounts, amounting to three thousand dollars, in trust to be collected and appropriated by said Lee to the payment of said claims to R. S. & Co., and that Lee refuses to account for these claims so received in trust. This agreement, creating a direct trust, coupled with the refusal of Lee to execute or carry it out, constitutes the *gravamen* of this bill.

When, however, we come critically to examine the record, it is quite apparent that no such agreement or trust is shown by the proof. The answers of both Lee and Ivey deny it, and there is not a witness who proves it.

John M. Ross, through whom it is alleged the agreement was made, states, that he was informed by Lee that he (Lee) had received claims from Ivey & Goodwin on different persons, sufficient to secure the amount of indebtedness of I. & G. to R. S. & Co.; but the other proof very clearly shows how these claims were deposited with Lee; and this witness states, that I. & G. had made an assignment, and proposed to their creditors to accede to the conditions named in it by the 28th or 29th July, 1834; that on the 19th July, 1834, said witness went to Ivey & Goodwin, and proposed to them, "that he would leave his claims in the hands of Lee, and to whom they, the said I. & G., promised that if, on the termination of the assignment, (that is, the 29th July, 1834,) such assignment should not be perfected, by the creditors of Ivey & Goodwin not agreeing to it, then the said I. & G. agreed to place in the hands of said Lee good and solvent notes, and

accounts due from people in that county, known to said Lee to be good, sufficient to pay the indebtedness of said I. & G. to R. S. & Co." What the conditions of this assignment were, or whether the creditors ever agreed to them, or perfected the assignment, is not shown by this witness. Indeed, he does not state that any claims were ever placed by I. & G. in Lee's hands under this agreement; but merely, that Lee informed him that he had claims which he had received from I. & G., sufficient to secure the amount of I & G.'s indebtedness to R. S. & Co.; but he did not state, nor does it otherwise appear, he had authority thus to appropriate them.

The witness Goodwin, who was examined by the complainant, and who was a member of the firm of I. & G., says, he had ample means of knowing the situation of the firm, having access to all the books and papers of the same; and he testifies that the notes and accounts of said firm were turned over to Lee for the benefit of all the creditors, and that Lee was employed by the firm of I. & G. to obtain them a release from all their liabilities, by procuring the acceptance by the creditors of the compromise, as he calls it; that it was understood and agreed, that if no other creditors of the firm of I. & G. should come into the arrangement, than Ross, Strong & Co., Jack F. Ross, Turner & Lewis, Mott & Thompson, and John M. Mott, then these creditors should derive the whole benefit of the said arrangement. This witness attaches a schedule of the claims, so placed in the hands of Lee, for the benefit of the creditors of the firm, to his deposition. So that, according to the proof made by this witness, the contract under which Lee received the notes was totally different from that set out in the bill.

But it is unnecessary to set out in this opinion the proof made by the several witnesses, as it would render it too prolix. It is sufficient to state, that after a most careful examination of the several depositions taken by complainant, we find no witness who proves the agreement set up in the bill. While on the other hand, as previously observed, the answers positively deny it, and the deposition of Brown, who states he was the clerk of Ivey & Goodwin during the whole time they were engaged in the mercantile business, and had a perfect knowledge of their transactions, goes directly to

sustain the answer of Lee, and to prove that the latter received claims amounting to between four and six hundred dollars from I. & G., and was authorized to pay what he might collect to Turner & Lewis, Mott & Thompson, and Ross, Strong & Co., or to Ivey & Goodwin. Although suits were brought on some of these claims in the names of Ivey & Goodwin, *for the use of Ross, Strong & Co.*, and in some instances the money collected, yet, taken in connection with the proof in the case, this fact fails to sustain the title to relief made by the bill. There were several firms to whom Lee was authorized to pay the money when collected, and it is not remarkable that he should have used the name of one of them, instead of cumbering the action by using the names of all.

The admission contained in the previous answer of Lee, that he held these claims for the sole and exclusive use of Ross, Strong & Co., explained, as we have said in the statement, is not sufficient to warrant the relief prayed. Lee is but the trustee of the fund, and his admissions ought not to defeat the right of the other parties who are the beneficiaries. Besides, if he had made the admission in this suit, and the fact had been positively denied by his co-defendant, as it is, such answer could not be received in evidence against his co-defendant.

But the complainant's own proof satisfies us that Lee was mistaken in his first answer, and this mistake should not in equity be visited with the consequences of an estoppel. Estoppels are not favored in equity, and a court of chancery will never allow an innocent mistake of fact, which does not materially interfere with the rights of the opposing party, so to operate. The previous answer, in view of which this bill may have been filed, could well have been considered with reference to the cost; but it gives no title to relief, under the circumstances of this case.

In any aspect in which the proof can be viewed, it is very clear, that to afford relief upon it, the complainant would recover upon a state of case different from that he makes by his allegations, or upon an agreement materially variant from that set up by him. We have seen this is not allowable. It follows, therefore, that the Chancellor did not err in refusing the relief prayed.

This view renders it unnecessary, and perhaps improper, that we should decide the other questions raised upon the argument.

The Chief Justice fully concurs with me in both of the foregoing positions; but my other brethren, fully concurring in the last position, prefer to be considered as expressing no opinion as to the construction of the eighth section of the bankrupt act.

Let the decree of the Chancery Court be affirmed.

McNEIL *vs.* MACON'S ADMR.

1. When a claim against an insolvent estate is properly filed in the Court of Probate, and its validity is not contested by the administrator, or a creditor in the name of the administrator, in the manner prescribed by the act of 1843, the affidavit of the claimant is sufficient to establish it. In such case, the Judge of Probate has no power to call for other proof; if the affidavit is regular, it only remains for him to allow the claim, and charge the estate with its payment *pro rata.*
2. When the record shows, that a claim against an insolvent estate was properly filed in the Court of Probate, verified by the affidavit of the claimant, and that other evidence as to its validity was afterwards adduced before the judge, who rejected some of it, and considered the remainder insufficient to establish the claim, which he consequently refused to allow; and it is not shown by the record, either affirmatively or by fair implication, that the administrator, or any creditor in his name, ever called in question the justness or validity of the claim, nor that any issue was made up to test it, the proceeding is wholly without authority of law, and the judgment of the court rejecting the claim will be reversed on error.

(Chilton, J., *dissenting*, held, that in such case, if the record fails to show that the plaintiff in error raised any objection in the court below to the mode of procedure, or that he was forced to adopt it, or that a jury was denied him; and the only errors assigned are, the rejection of the claim and the exclusion of the evidence, then the bill of exceptions should be construed most strongly against him, and the Appellate Court should presume, that a formal issue was waived, and that the plaintiff consented to substitute the judge for the jury, in which case the decision of the court could not be reviewed, except in the exclusion of the evidence.)

3. In such case, the rejection of the claim is a final judgment, which will support a writ of error.

ERROR to the Court of Probate of Dallas.

It appears, by a recital in the record, that the estate of Macon had been declared insolvent, and within the time prescribed in the statute McNeil filed a claim in the clerk's office, verified by his own affidavit. This claim consisted of a title bond made by Macon to McNeil for a half section of land, which is described in it. McNeil made oath that he had paid all the purchase money, and that Macon had failed to make title to the lands, although he had demanded one of him; that the title of the land was in Macon's father, who was embarrassed, and against whom judgments were obtained, and execution issued, under which the land was sold by the sheriff of Macon county; that the title never was in Wm. R. Macon; affiant claimed, on account of this breach of covenant, that he was entitled to demand, and have of the estate of Macon the amount of the purchase money, with interest; which he deposes have never been paid to him. The record does not show that the claim was objected to in the manner prescribed by the statute. Clay's Dig. 194, § 11. Nor does it show that any issue was made up under this act. No decree of insolvency is found in it, nor any thing to show such insolvency, except the caption of the record, which recites that the proceedings contained in it, were had "In the matter of partial settlement of the estate of William R. Mason, deceased, duly declared insolvent;" it then sets forth, in a bill of exceptions, a mass of testimony sufficient to establish the claim, a part of which was excluded by the Judge of Probate, and the remainder was held by him not sufficient to charge the estate with the payment of the demand. To his action, in this respect, exceptions were taken by the counsel of McNeil, and a bill of exceptions, which appears in the record, was signed and sealed by the judge.

The decree of the court rejecting the claim is here assigned for error.

J. P. Saffold, for plaintiff in error.

Lapsley & Hunter, *contra.*

LIGON, J.—The proceedings in reference to the allowance or disallowance of claims against insolvent estates must be regulated by the provisions of the act of 1843 in relation to that subject.

By the ninth section of that act, it is provided that, "Every person, having any claim against such insolvent estate, shall file the same in the clerk's office of the said court, within six months after such estate is declared insolvent; and every such claim shall be verified by the affidavit of the claimant, and the clerk shall give a receipt therefor to the claimant, his agent or attorney, and shall endorse on such claim the day on which the same shall be filed; and shall keep a docket or list of such claims, which shall, at all times, be subject to the inspection of the administrators and creditors of the estate; and if no opposition shall be made to the allowance of such claim, in the manner hereinafter provided, within nine months after the time when said estate was declared insolvent, such claim shall be admitted and allowed, as a good and valid claim against the said estate, without further proof." Clay's Dig. 194, § 10.

By this section, the manner of presenting and filing claims against insolvent estates is clearly pointed out, and in cases in which no opposition to their allowance is made, in the form required by the next section of the act, the affidavit of the claimant alone is sufficient to establish it. Under this section no discretion is given to the Judge of the Probate Court. When a claim is filed according to its provisions, and its validity is not contested by the administrator, or a creditor in the name of the administrator, in the manner required by the tenth section of that act, he has no power to call for other proof; all that remains for him to do is, to see that the affidavit is regular, and if this be so, to allow the claim, and charge the estate with its payment *pro rata.*

The record in this case does not show, either affirmatively or by fair implication, that the administratrix, or any creditor in her name, ever called in question the justness or validity of the claim of the plaintiff in error, by filing objections in writing; nor does it any where appear, that an issue was made up to test it, or that any thing equivalent occurred in the Probate Court. From all that appears, the judge, *mero motu*, instituted an inquiry into the justice of the claim, heard some proof, and rejected other, and then pronounced against the validity of the claim, and refused to allow it. Such a proceeding is wholly without authority of law, and manifestly erroneous.

As the proceeding to contest the claim was not regulated by the tenth section of the act of 1843, (Clay's Dig. 194, § 11,) and consequently the writ of error sued out in this case cannot be predicated upon the fourteenth section of that act, my own opinion is, that it is prematurely sued out, no final order or decree having been made within the meaning of the act of 1821. Clay's Dig. 297, § 4. But my brethren think differently, holding that the rejection of a claim against an insolvent estate by the Judge of Probate Court, is final as to that claim, and that a writ of error will lie to this court under the statute last referred to. To this effect is the case of Shortridge v. Easley, Admr., 10 Ala. 520. In that case, however, the writ of error could have been sustained under the act of 1843, for it was fully within the letter of that act, without resorting to the act of 1821, or in any manner invoking its aid. That portion of the decision I regard as a *dictum*, involving an erroneous exposition of the act referred to. As the writ of error is held to be regular by a majority of the court, I fully concur with them in the judgment of reversal.

It may be proper to remark, that if the judgment in the court below was rendered more than nine months after the estate was reported insolvent, no contest on this claim can now take place in that court; for, after that time, the administratrix and creditors are not allowed by law to question its justice, or to impeach its validity. The record sent up is very meagre, and probably defective; should this be the case, and the record below show that objections were there made, within the time and in the manner prescribed by the statute, (Clay's Digest 194, § 11,) that court will proceed to try the issue made on such objections, as that section of the act directs; or, if nine months had not elapsed from the report of insolvency to the time the judgment was rendered in the Probate Court, objections will be allowed until the expiration of that period, without taking into the computation the time the case has been pending in this court.

Let the judgment be reversed, and the cause remanded.

CHILTON, J.—I feel it to be my duty to dissent from the practice which I conceived is sanctioned by the opinion of my brethren in this case.

The record shows there was a contest respecting the validity of McNeil's demand, and he adduced before the judge much proof in relation to it, some of which was rejected, and the remainder was adjudged insufficient to support the claim, which was consequently rejected. The exclusion of the proof by the judge, and his decision upon that which was admitted, in rejecting the claim, are assigned for error. True, no formal issue appears in the record; but this is not assigned for error, and the rule of practice heretofore adopted is, to consider no matters not assigned. Minor's Rep. 11–23–35; Stebbins v. Fitch, 1 Stew. Rep. 180; Long v. Rodgers, 19 Ala. Rep. 328. It is said the rule goes farther, and justifies the court in declining to consider matters which, though assigned for error, are not insisted on in argument by the counsel. Cunningham v. Carpenter & Watson, 10 Ala. Rep. 109. The general assignment that the court erred in rejecting the claim, does not in my opinion raise the question of error in allowing the parties to proceed in the absence of a formal issue. It was competent for the parties to have waived this in the court below; and I presume they did, or the objection would have been taken in that court, and assigned for error in this.

Again: the statute requires the issue to be tried as at common law, that is, by a jury; but the parties can waive a trial by jury, and submit the matter of contest to the adjudication of the judge. The bill of exceptions taken by McNeil, the plaintiff in error, and which must therefore be construed most strongly against him, shows, that he submitted his proof to the judge, but fails to show that he was forced to do this, or denied a jury, or that he raised any objection to this mode of trial. Then is it not the reasonable and legitimate intendment, that he consented that the court, instead of the jury, should decide upon the facts? I hold that it is, and that the verdict of the judge on the facts is as conclusive as if rendered by a jury, and is no more the subject of revision by this court. Ethridge v. Malempre, 18 Ala. R. 565. If he erred in excluding the proof, however, that error may be reviewed, although he excluded it from his own consideration.

Under the decision of my brethren, the presumption is indulged, *against* the regularity of the judgment, and in *favor* of

the *party excepting*, that he submitted proof in support of his claim, the justice and validity of which were not impugned, and that the court actually rejected the claim, of the correctness of which there was some proof, *although no objection was taken to its allowance.*

Thus, McNeil is enabled to speculate upon the chances; for had the court allowed his claim, it were well, and the judgment founded on the judge's finding irreversible; but having failed in the contest to obtain a judgment of allowance, he is permitted to reverse the decree rejecting the claim, because the record discloses no formal contestation. The result, therefore, is that the case is sent back that a formal issue may be joined; and it may be, to return upon us with the same questions which have already been twice argued, but are left undecided.

SMITH & LOVELESS, Adm'rs. *vs.* HALL.

1. When a devisee's undivided interest in real estate is sold under execution at law against him, and the land is afterwards sold under an order of the Court of Probate, for the purpose of distribution, the purchaser at the sheriff's sale of the devisee's undivided interest, cannot petition the Court of Probate for a distribution of the proceeds of sale, under the statute which allows devisees, legatees and distributees to have a distribution of the estate after the lapse of eighteen months, (Clay's Digest, 196, §§ 23, 24,) (Dargan, C. J. and Ligon, J., *dissenting.*)

Error to the Circuit Court of Tallapoosa.

Tried before the Hon. J. J. Woodward.

The defendant in error filed his petition in the Orphans' Court of Tallapoosa County, setting forth, that John Loveless died in said county, after first having made and published his last will and testament, by which he devised certain lands to his wife for life, and to his children in fee at her death, to be equally divided among them; that there were ten children entitled to take under the will, among whom are John and Daniel Loveless, (the names of the others are also set

forth in the petition;) that Joseph C. Rawles, then sheriff of Tallapoosa county, after the death of the widow, became administrator with the will annexed of the elder John Loveless, and as such filed his petition in the Orphan's Court, setting forth that the lands devised could not be fairly, equally, and beneficially divided among the parties in interest, without making sale of them; that an order was accordingly granted, and a sale made in pursuance thereof. At this sale the lands brought $300.

The petition further alleged, that before Rawles, the administrator with the will annexed of John Loveless, filed his petition for the sale of the lands, and after the death of the widow of the testator, one John C. Holeman had obtained a judgment in the Circuit Court of Tallapoosa county, (in which the lands are situated,) against John and Daniel Loveless, two of the devisees under the will, upon which an execution issued to the coroner of Tallapoosa, which was levied upon the undivided interest which the defendants in that judgment had in the lands devised, which was sold, and the defendant in error became the purchaser; that the coroner made him a deed for the undivided interest of said John and Daniel, which was duly recorded. The petition further sets out, that after the purchase of the petitioner, and before the sale by the administrator with the will annexed, said administrator had received $111 for rent of the premises; that upon the expiration of his term office as sheriff, Rawles relinquished his administration, and paid over to the plaintiffs in error, who became administrators *de bonis non* with the will annexed, the purchase money and rents aforesaid, and that they yet have them in their hands; that the estate was not finally settled when the petition was filed, but more than eighteen months had elapsed since the grant of letters of administration.

He prays that the administrators *de bonis non* be compelled, by decree of the Court, to pay to him the portions to which John and Daniel Loveless would have been entitled under the will of John Loveless.

On this petition citations issued to the plaintiffs in error, who appeared, and filed reasons why the prayer of the petition should not be granted. They are numerous aud prolix, but may be resolved into two, to-wit: 1st. That the petitioner

had no such interest in the estate of the testator as would entitle him be heard in the Orphans' Court; and, 2d, That he took no title to the premises devised by his purchase at the coroner's sale.

The principal facts stated in the petition were admitted in the Orphans' Court, and, without any bill of exceptions, were spread on the record at the request of the petitioner. The Orphans' Court dismissed the petition.

The case was taken to the Circuit Court by *certiorari*, where the judgment of the Orphans' Court was reversed, and on the record sent up, the Circuit Court rendered judgment in favor of the petitioner, without requiring the execution of a refunding bond.

From this judgment of the Circuit Court, a writ of error was sued out by the administrators with the will annexed, and the case brought here for revision.

The judgment of the Circuit Court is here assigned for error.

SEABORN WILLIAMS and J. FALKNER, for plaintiffs in error:

1. Daniel and John Loveless had no such interest in the land as was the subject of levy and sale under execution at law, and, therefore, Isaac P. Hall acquired no right by his purchase from the coroner of Tallapoosa.

2. The estate of Jno. Loveless was yet in the course of administration; the land was subject to be sold by the administrator to pay the debts of John Loveless; the administrator did sell, as is shown by the record.

3. If Hall acquired any title, it was legal; it will not be pretended he could have acquired any other. If legal, Hall had a right to enter into possession; if he had that right, ejectment was his remedy; if his title was not sufficient to support that action, it is good for no purpose whatever.

4. While the land was in the hands of the administrators it was trust estate, the administrator having a paramount right till the close of the estate, or it was found that it was not needed to pay debts.

5. The Orphans' Court is one of limited powers; has no other than is given by statute. The power here sought to be exercised was never conferred, or intended to be conferred, on the Orphans' Court.

6. It will not be pretended that the power of the Orphans' Court is concurrent with the Court of Chancery in such cases. It is denied that either court could have given the remedy sought. If, however, the judgment creditor, whose judgment Hall claims through or under, had seen fit, at a proper time, and under proper circumstances, to have gone into equity, he could have done so, and subjected the interests of Daniel and John T. Loveless.

7. The Orphans' Court has no power to substitute a stranger for an heir, or a distributee of an estate by process of law, without the consent of the heir, and allow such stranger such rights as to allow him to come forward and petition for distribution in a part or whole of the estate. Such a proceeding has never before been entertained, and is without the slightest foundation in law.

8. Nothing but the legal title to real estate can be sold under execution. Clay's Dig. p. 350, § 31. The legal title to an estate is in the personal representative until distribution, and consequently, is not subject to levy and sale under an execution against the heir. 10 A. R., 630. So far as the heir is concerned, the intestate's equitable or legal title to land is the same, and passes in the same way. 2 A. R. 712. As to the title of the personal representative to the real estate, see 10 A. R. 60, and 10 A. R. 393, and cases cited on plaintiff's brief in that case. By the construction of the Orphans' Court, it has no power to try questions of title to real estate; and to allow such a proceeding as this in the Orphans' or Probate Court, would involve that court, as well as heirs and distributees of estates, in endless difficulties.

HEFLIN, and BARNES & ALLISON, *contra:*

1. The title to real estate descends to the heir upon the death of the intestate *ancestor*, and not to the personal representative, and the administrator has nothing to do with it, and has no right to meddle with the same, unless for a division among the heirs under the statute or to pay debts. 2 A. R. 663; ib. 717; 12 A. R. 533; 15 A. R. 228 and 12 A. R. 391.

2. And the heir has such an interest in the land so descended, from his ancestor, as may be taken for his debts under an

an execution against him before distribution, or any action in the Probate Court; and the purchaser at the execution sale takes the title of the heir, subject to all the legal demands for the debts of the ancestor, while the title remained in the hands of the heir, that could have been enforced upon the land before the execution sale; in other words, the purchaser takes by his purchase, only such title as the heir had, and is substituted for the heir; and the land is liable to such proceeding, after the sale, as it would have been if no sale under the execution had taken place; the purchaser standing in the same condition as to distribution and sale to pay debts under the statute, as the heir did before the sale, he being by his purchase only an assignee of the heir; and the title of the purchaser and the other heirs may be divested, on the proper application of the administrator in the cases allowed by the statute, to pay debts or for distribution among the heirs; but in that case the purchaser is substituted for the heir whose interest has been sold, as in this case, and is thrown before the Orphans' Court to assert his interest for the proportional part of the amount of the sale made by the administrator, and he is entitled to the amount the heir would have got upon distribution. Mattock v. Sterne, 9 Ver. R. 326; Proctor v. Newhall, 17 Mass. R. 81; Griswold v. Penniman, et al., 2 Conn. R. 564; 16 Ohio 271; 12 A. R. 391; 17 A. R. 20.

3. Orphans' Court has, in the administration and settling up estates, equity jurisdiction, and an assignee may assert his interest in his own name, and it can make no difference that the assignee claims as a purchaser at an execution sale. When any one petitions the Probate Court for distribution, it is the duty of the administrator to bring those interested in the distribution before the court. Graham et al. v. Abercrombie et al., 8 A. R. 552. When the facts are all proven in the court below, the reversing court will render proper judgment upon the reversal, and not remand.

GOLDTHWAITE, J.—The act of 1812, (Clay's Dig. 196, § 23), gives the right, to any one entitled to the distribution of an intestate's estate, to proceed against the administrator, to compel distribution, at any time after eighteen months from the grant of letters. Another section of the same act confers

the same right upon legatees, (Clay's Dig. 197, § 24); and it is insisted, on the part of the defendant in error, that as he, by his purchase under the execution against two of the devisees, was invested with their interest in the lands of the testator, he was also substituted in their place as to their remedies to enforce distribution. The statute does not directly confer upon the purchaser, authority to proceed to obtain distribution in his own name; and the necessary result of the doctrine contended for, is, that if the interest of the devisee in the lands were sold to different purchasers, that in the event of a subsequent sale by the Probate Court, to pay debts or effect distribution, each purchaser would be entitled to proceed against the personal representative, and the consequence would be, that a court of limited powers would often be embarrassed, in the determination of adverse claims, involving the title of lands, and collateral to the main issues of administration, while the estate itself might be wasted in the costs of the proceedings. Another great inconvenience, if not a positive injury, would arise in relation to the refunding bonds, required by the same statute to be executed by the parties, in case the distribution is not made on a final settlement of the estate. Clay's Dig. 196, §§ 23–24. If the lands of the decedent were sold, under execution against the heirs or devisees, to fifty different purchasers, each must execute a refunding bond, to meet any debts which might thereafter come against the estate, and the personal representative forced to a separate suit on each of the bonds; while, on the other hand, by proceeding in the Probate Court, in the name of the devisee, legatee, or distributee proper, the integrity of the administration would be more fully maintained, and the difficulties arising from collateral issues in that court avoided.

The cases of Graham v. Abercrombie, 8 Ala. 552, and Petty v. Wafford, 11 ib. 143, decide, simply, that the assignee of an integral share of an estate may proceed in the Orphans' Court in his own name, to obtain distribution; but we do not understand that any of the decisions have gone to the length of holding, that different parties may be made by assignment of an interest in the estate, at partial settlements; or that a distributive share might, by assignment, be split into different portions, and each one having an interest be allowed to pro-

ceed in his own name in the Probate Court, for his portion. My own idea in relation to the statute under which these proceedings are instituted (Clay's Dig. 196, § 23–24), is, that it was intended to apply only to distributees and legatees *proper*, and was enacted for the purpose of enabling them, on a proper showing to the court, to force the executor or administrator to the distribution of a fund, which their necessities might require; but to hold that a devise of land may be cut up into different parts, and the holder of each be entitled to stand in the place of the devisee, as to all of his remedies in the Probate Court, would, in my opinion, not only be extending the operation of the statute beyond the intention of the legislature, but the means of introducing into that court, complexities and difficulties, which its powers are wholly inadequate to meet. The whole object of the probate laws seems to have been intended, to limit the jurisdiction of the Probate Court to the legitimate and natural relations growing out of administrations; to confer upon that court the powers necessary for the management and distribution of assets, in the direction of those who were immediately connected with administrations, such as heirs, legatees, and creditors, without providing for collateral relations which might arise, but leaving those relations to be provided for by courts, which, by the possession of more extensive powers and jurisdiction, were more competent to meet and provide for the exigency. The cases we have cited require us to recognize, on the final settlement of an estate, the right of the assignee to distribution in his own name: but a majority of this court think that the principle should not be extended beyond the decisions referred to.

It follows, from these views, that the Circuit Court erred, in reversing the judgment of the Orphans' Court; and judgment must be rendered here, reversing the judgment of the Circuit Court, and affirming that of the Orphans' Court.

LIGON, J.—The record presents two questions for the consideration of the court; 1st, Has the defendant in error any interest in the estate of John Loveless, deceased? and, 2d, Is his interest of such a character, that, under our statutes, it can be propounded in, and adjudged by the Orphans' Court?

It appears, that he purchased, at coroner's sale, under execution on a judgment at law, the undivided interest of John and Daniel Loveless, in the real estate of their father, before any partition had been made among the devisees, and while they were tenants in common with eight others. That this interest is subject to levy and sale under execution on a judgment at law, is abundantly established by the decisions of this, and of other courts of the highest respectability in the United States, and that the purchaser at such sale will take the title of the tenant in common whose interest is sold, is equally well settled. Mendenhall v. Randon, 3 S. & P. 251; Black v. Steel, 1 Bailey, 309; 16 Ohio, 271; Den v. Hillman, 2 Halstead, 180; Kelly v. Morgan, 3 Yerg. 437; Durant v. Cabbage, 2 Hill, S. C. 311.

In the case last cited, which was an action of ejectment by the purchaser at sheriff's sale, against the defendant in execution, to recover his undivided portion in the lands sold, of which the defendant in execution, and the other joint tenants, were in possession, the court would not permit the other joint tenants to become defendants, lest the action of the purchaser might be defeated; but they allowed him to recover, upon the strength of his legal title, acquired by his purchase, and, afterwards, to hold as joint tenant with the others. All the cases concur in treating the title of such a purchaser as a perfect legal title, and in substituting him to all the legal rights, to which the joint tenant, or tenant in common, was entitled in the land thus sold.

In the case of Graham v. Abercrombie, 8 Ala. Rep. 552, this court held, that "the interest of a legatee in an unsettled estate is the subject of assignment; and if one is made, it divests the interest of the distributee, so that no proceedings can be had by his representatives against the administrator; his assignee is thereby vested with all his rights, and they may be asserted by him in his own name." This decision is so well sustained by the reasoning of Mr. Justice Goldthwaite, who delivered the opinion of the court, and the authorities to which he refers, that I regard it impregnable; and I must confess my inability to discover any difference between the rights of one who derives his interest in an undistributed estate through the voluuntary assignment of the distributee,

and one who acquires such rights under a purchase authorized and sanctioned by law, and which all the authorities concur in saying, casts on him a perfect legal title, which he may assert in a court of law.

It seems to be thought, however, that because the administrator, by virtue of our statute, may rent lands, and, in certain contingencies, sell them, that, therefore, the right of the heir or devisee does not vest, until it is ascertained whether the real estate will be needed for the payment of debts. This conclusion is by no means a necessary one from the premises. The rights of the heir or devisee to the lands descended or devised, remain as they were before the passage of these acts. There is nothing in them to prevent the legal estate from vesting in him, on the death of the ancestor or testator; but the rights and powers given to the administrator by statute, are only so many incumbrances on his title, and both he, and a purchaser of his interest, take the title, subject to the legal call of the executor or administrator, should it be needed for the payment of debts, or for distribution. He may pass the title immediately on the death of the ancestor, and as he has a legal interest which he can convey, that interest must, of necessity, be subject to sale on execution for the payment of his debts. 16 Ohio, 271; 1 Barb. 75.

The power of the administrator to sell for the purpose of paying debts, is one conferred on him by the statute, for the protection of the rights and interests of creditors, who, by the policy of our law, are always preferred to the heir; and consequently, it cannot be affected by the act of heir or devisee, or by any assignment he can make; or, indeed, by any right derived from him, whether it accrue to the party asserting it by the act of the heir himself, or by the act of the law. Until the trust created by the statute in favor of creditors, of which the administrator or executor by statute is made trustee, is fully discharged, no act of the heir, or title derived through him, will be allowed to operate to defeat his power to sell the realty to pay the debts of the ancestor. This proposition, I apprehend, will scarcely be disputed.

The same statute which confers on the personal representative the power to sell real estate for the purpose of paying debts, gives to him similar power for the purpose of making

a fair, equal, and beneficial division of such estate among the heirs, devisees, or distributees. As, in the one instance, the law constitutes him trustee for the creditors of the intestate or testator, so, in the other, the same law makes him trustee for those entitled to the realty. The law, and not the parties in interest, creates the trust, appoints the trustee, defines his powers, and points out and regulates the manner of their exercise, as well as the contingency on the happening of which they shall be called into action. To say, that when this contingency arises, one of the beneficiaries of the trust can, by his action alone, defeat the exercise of the power of the trustee, would be to assert a proposition which the law, according to my apprehension of it, not only does not sanction, but expressly repudiates. This trust is created, and is to be exercised, for the benefit of all who have an interest in the real estate. In the record before us, it is shown that there are ten devisees; and to hold that any number, short of the whole of them, could defeat the power of the administrator to sell for the purpose of distribution, when he makes proper application to the Orphan's Court, and, according to the statute and our practice under it, shows that a fair, equal, and beneficial division cannot be made, among the parties in interest, without it, would be to hold, that the declared purposes of the law are subject to be defeated by the action of a portion of the devisees, or distributees. And, if such action is allowed to defeat the purposes and objects of the statute, when they relate to the power to sell for distribution, I am not master of any process of reasoning, by which such a result, from the same cause, would not arise, where the object of the exercise of the power, is a sale for the purpose of paying the debts. The statute has blended the two objects for the exercise of the power together, and conferred the power itself in the same words in each case; and that which will defeat its exercise for one, will also defeat it for the other.

2. Having seen that the purchaser at the coroner's sale, is the legal owner of the right and interest of John and Daniel Loveless, in the lands devised by their father, I come to consider the question, whether this interest is one which he can assert in the Orphans' Court. To my mind, this question is al-

ready settled in the case of Graham v. Abercrombie, before cited. In that case, the interest of the assignee of the legatee was propounded in, and adjudged by the Orphans' Court. In this, the application is made to the same court, by one who, through the sale of the coroner, has become the legal owner of all that ever belonged to the two devisees whose interest he bought, in the lands of the father; and I have no hesitation in saying, that the defendant in error became as fully and amply entitled to all the rights and remedies of Daniel and John Loveless, in respect to the lands devised, as though they had voluntarily assigned them to him. If I am right in this, then the case of Graham v. Abercrombie is decisive of this branch of the inquiry, and is conclusive to show that the Orphans' Court erred in repudiating the case for the reasons assigned by it.

But it is said, that in the case of Graham v. Abercrombie the question arose on a regular settlement of the administrator's accounts, and not under the act which authorizes legatees and others to seek partial distribution, after eighteen months have elapsed from the grant of letters of administration. It is difficult to perceive how this can affect the question of jurisdiction in the Orphans' Court. The persons who are entitled to seek distribution in the two cases, are, according to the language of our statutes, the same. In both statutes the language employed to describe them is identical, and I think it beyond question, that the purchaser of a devisee's interest, at sheriff's sale, is a "person entitled to distribution" in the testator's estate; and it makes no difference at what period of the administration he seeks it, provided the devisee himself would be entitled to the remedy at such period. In short, such purchaser is substituted to all the rights and remedies to which the devisee, whose interest he has bought, would himself have been entitled, had no sale taken place.

That he could, when it was ascertained that it was not necessary for the administrator to make sale of the lands for the payment of debts, or for distribution, compel partition of the real estate in any form of action which the law allows to the devisee, will scarcely be seriously doubted. What, then, is to hinder him from seeking his distributive portion of the purchase money, when the lands have been sold by the ad-

ministrators avowedly for the purpose of making distribution among the persons entitled to it? There certainly could be nothing, provided all the parties interested in the realty were regularly made parties to the application for the order of sale. It would not be tolerated that, after a sale thus regularly made, the devisees, or those claiming under them, either in privity of contract or privity of law, should be allowed to repudiate the sale, and assert their title to the lands devised, against the purchaser at the sale made by the administrator. Having been made parties to the proceedings under which the sale was made, they would be concluded by the decree, and estopped from afterwards setting up title to the premises sold.

This, however, does not appear by the record of this case. It is no where shown that the defendant in error was made a party to the application of the administrators for power to sell the lands. But I do not conceive that there are no other means by which the devisees, or those claiming under them, could be estopped from setting up their title against the purchaser at the sale made by the administrator. Another, equally as effectual, exists here. The defendant in error, by filing his petition in this case, setting forth his title to the lands; the sale by the administrator; the price for which it was sold; the value of the rents; and praying distribution of the money arising from such sale and rents, waives, by this record, every objection he could take to any irregularity which existed to his prejudice in the proceedings by which it was brought about, and assents to the title of the purchaser, in a manner fully as effectual in law, as he could have done, by being made a party to the proceedings for the sale, or by his deed duly executed for that purpose. He is estopped by the record in this case from ever setting up his title against the purchaser at the administrator's sale. Bean v. Welch, 17 Ala. Rep. 770.

The power of the administrators to sell the lands for purposes of equal distribution among the devisees, is as full and ample, as it is to make sale of them for the purpose of paying debts, and the proceedings to bring about a sale are the same in both cases. Clay's Digest. When the sale is made, the effect of it is, to divest the title of the devisees, and cast it on

the purchaser; for, the order of sale made by the Orphans' Court, vests the title in the administrator, for all the purposes contemplated by it; and if this be regular, or if the irregularities are waived by those whose interests are affected by them, the title of the purchaser, under such sale, can never be successfully impeached by the devisees.

The proceedings in this case were commenced under our statute, (Clay's Dig. 196 §§ 23 and 24) by which it is enacted, that "any person entitled to distribution of an intestate's estate may, at any time after the expiration of eighteen months from the granting of letters of administration, petition the Orphans' Court, setting forth his claim; whereupon it shall be the duty of said court, to grant a rule on the administrator, administratrix or administrators, (as the case may be,) to make distribution agreeably to law; but no administrator, administratrix, or administrators, shall be compelled to make distribution at any time, until bond and security be given by the person entitled to distribution, to refund a due proportion of any debts or demands which may afterwards appear against the intestate, and costs attendant on the recovery of such debts." The twenty-fourth section extends the benefits of the twenty-third to legatees and devisees.

It has been shown that the Orphans' Court erred, in repudiating the petition of the defendant in error, for the reasons alleged in the answer of the administrators with the will annexed, and those set forth in its own decree of dismissal. Yet, it is equally clear, to my mind, that the opposite decree of the Circuit Court, when its terms are examined in reference to the legislative enactments above cited, cannot be sustained.

The decree of the Circuit Court is in these words: "It is therefore ordered and decreed, that the said administrators, James Smith and William Loveless, pay to the said Isaac P. Hall the interest of Daniel and John T. Loveless, arising from the proceeds of the sale of the said lands, amounting to eighty-three dollars, for which let execution issue." This decree is absolute in its terms, and no where extends to the administrators that protection which the law throws around them, at the time it allows distribution before the estate is

finally settled. No refunding bond is required to be given, but the administrators must pay the sum found due, without any indemnity for the loss they might sustain if debts or demands afterwards appeared against the estate of the testator. While the law, on the one hand, will not permit an administrator, upon frivolous pretences, to withhold from the heir his inheritance, after eighteen months have elapsed from the date of his letters; it will not, on the other hand, allow the latter to draw from the hands of the former the funds of the estate, which may be needed for the payment of debts, without giving him security that the funds thus withdrawn shall be ready to meet such necessity when it may arise. The failure of the Circuit Court to require, by its decree, the execution of such a bond, as a condition precedent to the issue of execution, is an error for which it must, in my opinion, be reversed.

The requirement of this act is very similar to the provision made by law for the protection of non-resident defendants in chancery, who have not submitted to the jurisdiction of that court; and this court has constantly regarded the failure of the Chancellor, to require the execution of the bond provided for in that case, as an error, so fatal that the decree would be reversed, notwithstanding it was proper in all other respects. Rowland et al. v. Day, 17 Ala. Rep. 681.

For another reason, also, I think the decree of the Circuit Court cannot be sustained. The record from the Orphans' Court does not pretend to set out all the proof which was before that court, in relation to the amount of money in the hands of the administrators, arising from the sale and rents of the lands devised, after the defendant in error became interested in them; nor, indeed, does it embody, in any form, so as to constitute them a part of the record, any facts whatever, as having been proved or admitted before it, which established the sum for which the defendant in error was entitled to a decree. There is no bill of exceptions in the record of the Orphans' Court, embodying the evidence there given; there is no recital of proof in the decree of that court, by which the Circuit Court could be advised of the state of facts necessary to be ascertained before a final decree could be understandingly rendered. The Circuit Court, being thus

without the proof necessary to sustain a decree against the administrators, should have gone no further than to reverse and remand the cause. There may be, and doubtless there are cases, in which it would not only be proper, but it would become the duty of the Appellate Court, on reversing the judgment of the court below, to proceed at once to render the proper judgment; but this is not one of that class.

The decree of the Circuit Court should, in my opinion, be reversed, and the cause remanded to that court, with instructions for it to reverse the decree of the Orphans' Court, and remand the cause to the Probate Court of Tallapoosa county, to be there proceeded in according to the principles laid down in this opinion.

DARGAN, C. J., concurs in this opinion.

WILLIAMS *vs.* FITZPATRICK, Governor, &c.

1. When a paper is offered in evidence, and rejected by the primary court, as irrelevant, the Appellate Court will only examine the question of its relevancy.
2. Two suits were pending against a tax collector, for the county taxes of 1845 and 1846. On the trial of the suit for the taxes of 1845, he produced the receipt of the county treasurer for an amount greater than the sum due for the taxes of that year, but purporting on its face to be given for the taxes of 1845. He also examined the county treasurer as a witness, who testified that, though he would not deny his signature to the receipt, yet he was sure that defendant had never, at any one time, paid him so large an amount as that specified in the receipt: that if the receipt was his, it must have been given for some smaller receipts which defendant had never surrendered; that he was county treasurer for 1845-6-7, and had never had a final settlement with defendant. *Held,*

   That upon this state of proof, defendant might introduce as evidence the said county treasurer's receipts for the year 1846, for the purpose of showing that all the receipts amounted in the aggregate to the taxes of the two years.
3. A receipt given by the county treasurer while in office to the tax collector, for the county taxes, is admissible evidence in itself at all times for the latter, upon proof of the signature and that the maker was county treasurer at the time of its execution.

Error to the Circuit Court of Morgan.
Tried before the Hon. Thomas A. Walker.

This was an action of debt instituted in the name of the Governor, for the use of Morgan county, against Thomas R. Williams and his securities, on his official bond as county treasurer. The suit was brought to recover the amount of the county taxes for the year 1845, which, it was alleged, the defendant had not paid over; and another suit was also instituted for the taxes of 1846, which was pending at the time of the trial of this. The facts of the case will be readily understood from the opinion of the court.

Wm. Cooper, for plaintiff in error:

1. We insist that the receipts offered were, in connection with the receipts of 1845, pertinent, and that apart and of themselves they were pertinent.

The payment of taxes of 1846 raises the presumption of payment in 1845; be the presumption, ever so light, it is evidence, and the jury must have it for what it is worth in connection with other facts. 4 Philips' Ev., part 2, page 581, citing, 2 Edward's Ch. R. 427; 9 Yerger 424, 428.

The admissions of a trustee (treasurer) against beneficiary are evidence *prima facie*. 3 Humph. R. 472; 23 Pick. 243. All surrounding circumstances that would throw light on the question at issue, if it can be legally proven, must be admitted. 8 Gill & Johns. R. 248. Evidence that at all tends to show the truth is pertinent. Littell's Selected Cases 499. So, too, it is competent, in connection with eight years lapse of time on a note, to prove that the holder was a close collector. 5 Yerger's R. 97, 98. Subsequent settlements and lapse of time are evidence of payment. Peck's R. 60, 65; 9 Yerger 424, 428; 2 Campbell's R. 321; 3 Hayd. 29, 31.

2. Tunstall was the officer and agent to receive the taxes collected by Williams, and all of Tunstall's admissions, and receipts mere competent, no matter when made or given, if he was in office at the time; and his interest lead him to admit no payment not actually made, and, in fact, his interest was antagonistic to the discharge of Williams by payment to Tunstall. 26 Maine, (13 Shepl.) 107; 5 Washburn 349; 1 Comstock's R. 525; 12 Ala. 77.

3. The entire transactions between the tax collector and receiving treasurer should have gone to the jury, if they tended

at all to show the state of account between them; for on that true state of the account depends the right of action on the bond sued on in this case, and every link of the chain of proof was admissible; see particularly, 8 Barr's Penn. R. 64; 13 Ala. 583; 13 Ala. 641; 3 Barr's R. 179; 12 Ala. 823.

4. Proof is often competent, yet of itself it is insufficient to maintain the issue. 1 Ala. 84; 5 Porter 155. If pertinent, it must not be rejected, because unaided it will be insufficient to maintain the issue. 7 Ala. 457; 7 Ala. 798; 3 Ala. 16; 2 Shepl. 108; 10 Missouri 345; 5 Monroe 502; 6 Serg. & Rawle 55, 6; 9 Cowen 83, 88; 19 Ala. 165.

5. Again, though the case stated by the attorney at the bar may not make the pertinence apparent, yet if it be pertinent it must go to the jury. 5 Hill's New York R. 291. Every link must come out that forms the chain of proof, for on the evidence the proof rests. 2 Watts & Serg. 411; 9 Ala. 313; 2 Edward's Ch. R. 427; 13 Ala. 718.

6. Again, that which is apparently foreign and irrelevant, may by the statement of counsel be shown to be applicable. 6 Ala. 390; 6 Ala. 407; 19 Wendell 203; 2 Starkie's Ev. 381.

7. The jury constitutes that branch of the court to whom the weight of testimony is left; it is error in a court to undertake to pass on the weight of evidence; that is the province of the jury. In this case we offered to prove that defendant had paid a sum or sums of money, which, in the agregate, made the taxes of 1845 and 1846. That was pertinent, and if pertinent should have gone to the jury; it was pertinent if insufficient, and the jury alone could pass on the sufficiency of the evidence; we might have argued properly an error in the dates of the receipts, or that the large receipts embraced smaller ones of 1845 and 1846; but all this was cut off by the court, and abstractly the minds of the jury would have grappled with the facts that the payments made the exact taxes of 1845 and 1846, and this we were excluded from proving. This court, on a former occasion, decided that it was proper to leave it to the jury to say, whether certain proof amounted to a warranty in the sale of a horse; this is going farther than we here need to go, because it left the law on certain facts to

the jury. 10 Ala. 386; 3 English, (Ark.) R. 157; 19 Johns. R. 313.

The question of warranty is often left to the jury, because it frequently depends on a chain of testimony on which they are constrained to pass in their verdict. 19 Johns. 290. This is much more difficult matter for a jury, than the mere question of payment, as in the case at bar; for in the case of warranty, law and fact are both involved in the issue and finding.

8. In the case at bar the plaintiffs in error, defendants below, relied on Tunstall, the treasurer, to make out their defence; his evidence turned out to be partly adverse, and he, in fact, imputed a fraud to defendant in getting the receipts, or some of them; under this state of the case they could not discredit him, nor show his incompetency, for they had waived any objection they could have made by introducing him; his interest conflicted with theirs, for he would be liable for all that Williams had paid him, and no more; but defendant below had the right to make up the defects of their defence by other proof, as Tunstall's acts, and the proof of other witnesses and papers. But in this use of papers and witnesses they were stopped and excluded by the court. 10 Ala. 386.

James Robinson, *contra:*

The receipts offered were not properly proven; nor was there any offer so to prove them. Before they could have been made available against the county for any purpose, it should have been shown that they had been given by Tunstall at a time when, as the agent of the plaintiff, he had a right to give them. Bell v. Pharr et al., 7 Ala. 813. If this proof had been made, still the receipts were not admissible; because Tunstall, the agent, was present, and had been examined, and the court offered to let them examine upon all the points they desired. His oral testimony was higher and better evidence than his receipts. Bell v. Pharr et al., 7 Ala. 813.

Admit it to be true that Williams paid Tunstall too much for the taxes for 1845; with that fact the county had no connection. As an officer he could only receive what was due to the county. If Williams paid him more than this he must look to him individually for it. The county is no way bound by or for the act; because it was not done by Tunstall in the performance of any duty of his office.

When this excess was paid, as alleged, the taxes for 1846, perhaps, were not assessed. As well might we say a sheriff can receive money upon a writ in anticipation of the execution, as that a treasurer could receive taxes before they were due or had been assessed.

Again: suppose it is true that Williams paid Tunstall too much upon the taxes of 1845, what effect could the receipts for the taxes for 1846 have upon that? If the payments had been less in 1845, and greater in 1846, than the amount of the taxes, then the excess of 1846 might well be applied to the payment of the deficit of 1845. But it is not pretended that he paid too much upon the taxes of 1846.

What is the issue here? We say, the taxes of 1845 were not paid; defendant, that they were. The proof offered has no relevancy to this issue. Now if he paid the taxes of 1846, and no more, what effect can that fact have upon the question whether he paid in full the taxes of 1845?

PHELAN, J.—The defendant Williams introduced as a witness, in his behalf, Tunstall the county treasurer. After proving by him certain other receipts, which had been given by him to Williams, for the taxes of 1845, they came to a receipt which purported on its face to be a receipt from Tunstall for the sum of $1189 $\frac{95}{100}$ for the county taxes of 1845, dated 25th May, 1846. When testifying in respect to this receipt, Tunstall said, that, although he would not deny his signature, or that he had executed the same, yet "that he had no recollection of ever giving such a receipt, and stated, that he never received that amount of money from said defendant at any one time; and if the receipt was his, it must have been given by him in lieu of many smaller receipts, which smaller receipts he never got from the defendant."

In order to strengthen the character of this eleven hundred dollar receipt, which had been thus assailed by his own witness, whom for that reason he could not directly impeach, Williams offered a number of other receipts given to him by Tunstall, as treasurer, for the county taxes of 1846. In offering them, he stated, that he expected to show by them and those previously exhibited, that the whole taken together would amount to the county tax for the two years, 1845 and

1846. These receipts for the taxes of 1846, the court would not allow to go to the jury, upon the ground that they were not *relevant* to the issue.

The counsel for the defendant in error has argued, that they should have been rejected, because it does not appear that they were properly proved, or that Tunstall gave them at such a time as would make them evidence. They were rejected on the ground of *irrelevancy*, and we must confine our examination of them to that ground.

We think it quite clear that these receipts, which were rejected, should have been permitted to go to the jury.

Williams was sued on his bond for the county taxes of 1845, and in a separate suit for the county taxes of 1846. The proof is, that Tunstall was county treasurer for the years 1845, 1846 and 1847. He himself had already testified, that he had never had a full settlement with Williams, but had received payments from him and given receipts from time to time. If this eleven hundred dollar receipt was to be treated as good and valid, it, with the other receipts, would show that Williams had overpaid the taxes of 1845. But the counsel for Williams said, if you will allow all our receipts to go before the jury, they will show that the taxes for both years have been paid, and no more.

I am of opinion that these receipts were competent evidence, even in this view of the case, for in the subsequent suit, if Williams wished to avail himself of the benefit that any excess, in his payments or receipts for 1845, might give him, to make up a deficiency that might exist in the receipts of 1846, it would be important for him to show that he made a fair expose of the whole matter in the first suit. Otherwise, when he introduced the large receipt or some other in the second suit, alleging some mistake, the opposite party would say, this voucher was used in the other suit, but we never heard of this mistake before. If there were two suits for county taxes, and the tax collector had receipts from the county treasurer, that would cover both years in amount, but not in the terms of the receipts, this without more would make all the receipts relevant in both suits.

But the right to introduce the receipts of 1846, may be put upon a ground distinct from this. Tunstall, who was Wil-

liams' own witness, had, by his testimony, thrown a cloud of suspicion over the eleven hundred dollar receipt. It was the right of Williams to remove this, and his duty to do so, by all proper means. He could not impeach him, for he was his own witness. Indeed he might not feel willing to do so, even if he had the ability. The next thing was, to show that Tunstall was mistaken. He was not prepared to deny that he executed this receipt, but had no recollection of it; was sure Williams had never paid him so much at one time, and that this large receipt, if his at all, must have been given for smaller receipts which Williams had never surrendered. Here the man who is relied upon to support an important voucher, the very man who made it, surprises the party who introduces him, by raising very serious suspicions against it. He also says, that it must have been given for other receipts which are still in Williams' hands. He had before said, that he never had a full settlement with Williams, but had given receipts from time to time as money had been paid. While things are in this posture, Williams, to relieve the large receipt from the cloud thus cast upon it, says to the court, "I am sued as tax collector in two cases; Mr. Tunstall was county treasurer during all the time; now I propose to exhibit my receipts for 1846, to show that those, when added to these which I have already exhibited, including this one over which suspicion is cast, will just amount to the aggregate amount of taxes which I was bound to pay over in the two years." This court concur in the opinion, that such proof would have been calculated to strengthen the large receipt, against the suspicion cast upon it by the testimony of Tunstall, and by the fact that, including the amount of this receipt, the taxes for 1845 seemed to be overpaid; and that it should have been received. It was a feature in the case proper to go to the jury, and to be considered by them in making up their verdict. It is possible, that when other receipts came to be introduced, Tunstall might discover some that should have been surrendered, or if he did not, his own testimony would not tell with such powerful effect against the fairness of the large receipt.

It has been argued, that as Tunstall, who gave the receipt, was present as a witness, and ready to be examined on all

points touching them, that it was not competent to introduce the receipts as evidence in themselves at all. Tunstall was a competent witness for either party, it is true, but the holder of the receipts was under no obligation to call him. They were good testimony of themselves. They come within the well settled principle, that the admissions of an agent, made within the scope of his authority, and at the time of transacting the business of his agency, are the admissions of his principal. They are then part of the *res gestæ*, and can be proved as such. In this case the receipt of the county treasurer, is the receipt of the county, and there is no need to do more than to prove that the signature is genuine, and that the maker was county treasurer when it purports to have been made.

For authority on these points, see 1 Greenleaf, 125 *et seq.* Williams v. Shackleford, 16 Ala. 318; Bohannon v. Chapman, 13 Ala. 641.

For the error in rejecting the proof offered by the plaintiffs in error, the judgment of the court below is reversed, and the cause remanded.

HUTCHINSON *vs.* DEARING.

1. A decree in chancery is binding on all who are parties or privies to it, and concludes them as to every fact necessary to be ascertained before the final decree was rendered.
2. A mortgagor in possession may hire or lease the mortgaged property, and receive the rents and profits, until the mortgagee notifies the lessee or hirer not to pay such rents or profits to the mortgagor.
3. Notice from the mortgagee to the lessee or hirer, not to pay the rents or profits to the mortgagor, intercepts the rents and profits then due and unpaid, as well as those which may subsequently accrue, and the mortgagee becomes entitled to them.
4. Where a mortgagor of slaves puts them into the possession of his son-in-law, under the belief that they would be more profitable under his control, and for the purpose of enabling himself the more readily to pay off the mortgage debt, and with the agreement between them that, when the debt was paid, they should come to some understanding respecting the value and ownership of the slaves, and the mortgagee was apprized of this agreement, and assented

to it, he may, after notice to the son-in-law, bring assumpsit against him for the services of the slaves, notwithstanding he has previously filed a bill of foreclosure, and obtained a final decree thereon; *Provided*, it appears that the son-in-law was not made to account for said hire by the bill.

5. The Appellate Court will not reverse on account of a charge which asserts a correct legal proposition, although it may be objectionable from its generality. It is the duty of the party in such case, to ask more specific and definite instructions.

ERROR to the Circuit Court of Dallas.

Tried before the Hon. E. Pickens.

This was an action of assumpsit brought by Dearing against Hutchinson, to recover for the services of certain slaves. Upon the trial it appeared, that the slaves originally belonged to James Jackson of the State of Georgia, but the slaves were on a plantation in the county of Lawrence in the State of Alabama; and the said Jackson, being indebted to the said Dearing, in the sum of $11,036 $\frac{50}{100}$, did on the 24th day of October, 1840, execute to him a mortgage on the said slaves, with others, to secure the payment of said sum, which fell due on the first of January, 1841. It further appeared, that under an agreement made between Jackson and Hutchinson, Hutchinson took possession of said slaves, and removed them to South Alabama; but it does not appear, that he was to pay any specific sum by way of hire, or that he bought them; but the object of Hutchinson in taking them into his possession seems to have been, to employ the slaves more profitably, and thereby to extinguish the mortgage debt, or aid the mortgagor in doing so; and when this should be accomplished, Hutchinson and the mortgagor, Jackson, were to come to some agreement respecting the ownership of the slaves. It further appeared, that Dearing had notice of this arrangement, and sanctioned it; at all events, he did not object to it. Some time in 1843, Dearing filed his bill in equity to foreclose said mortgage, both against Jackson, the mortgagor, and Hutchinson, who had the slaves in his possession. At the December Term, 1844, of the Chancery Court, a decree of foreclosure was rendered, and it was referred to the register to ascertain the amount of the mortgage debt, who reported that $12,705 were due the mortgagee, for principal and interest. This report was confirmed, and the negroes were sold by the register

on the first Monday in October, 1845, and brought the sum of $9,107$\frac{50}{100}$, the whole of which was paid over to Dearing, except the sum of $195, which was retained by the register to satisfy the costs of suit. The evidence tended also to show, that several payments were made on the mortgage debt, but that most of them were made after the taking of the account in the equity suit, and before the bringing of this suit. The plaintiff claimed hire for the slaves, from the time of filing the original bill, and notice thereof to Hutchinson.

The court instructed the jury, that the account taken in the chancery suit was conclusive of the amount then due, but that payments since made could be shown, to prove satisfaction of the mortgage debt.

The defendant requested the court to charge the jury, that if the plaintiff recommended or assented to the sale or transfer of the slaves by Jackson, the mortgagor, to Hutchinson, without any agreement that Hutchinson should pay hire to the plaintiff, that then he could not recover. This charge the court refused to give; and instructed the jury, that if the defendant purchased the slaves with notice of the mortgage, and subject thereto, he was liable for hire after the filing of the bill and notice thereof to him.

The defendant also requested the court to charge the jury, that if the proof showed that the mortgage debt had been paid in full, then the plaintiff could not recover. This charge the court gave, with this qualification, that whether the debt was paid in full or not, must be determined by taking the chancery decree as showing the true amount due at that time, and then deducting such payments as had been subsequently made.

The defendant further requested the court to charge the jury, that the measure of damages should not exceed the amount now due upon the mortgage debt. This charge, the court also gave, with the same explanation or qualification that was given to the charge next preceding it.

The defendant further requested the court to charge the jury, that the record in the chancery suit was evidence of a former recovery; which charge, the court also refused to give. To the refusals to charge as requested, and to the charges given, the defendant excepted; and the court, at his instance,

signed and sealed a bill of exceptions, which is here assigned for error.

GEORGE W. GAYLE and SAMUEL F. RICE, for the plaintiff in error, contended:

1. That in the absence of any express contract to pay the plaintiff for the service or labor of the slaves, he cannot bring assumpsit, even if there was a liability on the part of the defendant to pay for such services. They cited Smith v. Stewart, 6 John. Rep. 46; 13 John. 489; 2 Taunt. 145; 17 Ala. 51; 1 St. & Por. 294; Chitty Pl. 107, and note.

2. That Dearing, by assenting to the sale or transfer of the slaves to Hutchinson, made by Jackson, deprived himself of all right to demand of him hire for the slaves. Wallis v. Long, 16 Ala. 138.

3. That it was proper to have made the defendant, Hutchinson, account for the hire in the chancery suit, and the failure to do so, precluded the defendant from recovery in this action. Gary v. Boykin, 7 Ala. 154; 4 Ala. 541.

4. That the charge of the court subjected Hutchinson to the payment of hire, even after the slaves were sold and delivered to the purchasers under the decree of foreclosure.

WATTS, JUDGE & JACKSON, *contra*, insisted:

1. That the decree of foreclosure, as it ascertained the amount then due on the mortgage debt, was conclusive against the defendant, as he was a party to said suit.

2. That the mortgagee is entitled to recover the rents and hire of the tenant of the mortgagor, after notice. They cited Coke v. Pearson, 6 Ala.; Chambliss v. Maulden, 4 Ala. 484; Smith v. Taylor, 9 Ala. 633.

3. To show that assumpsit is the proper remedy, they cited Davidson v. Earnest, 7 Ala. 817.

4. To show that the decree in the foreclosure suit did not preclude the plaintiff from bringing this action, they cited Davidson & Stringfellow v. Shipman, 6 Ala. 34; 1 Starkie on Ev. 221, 222, and note; Greenl. Ev. Vol. 1, §§ 228, 229, 230.

DARGAN, C. J.—All persons who are parties or privies to a decree, rendered by a Court of Chancery, are bound by

it. Perkins' Ed. of Daniel's Ch. Prac. vol. 2, 1210, note; and of course are concluded as to every fact necessary to be ascertained, before the final decree is rendered. It follows from this rule, that the account taken before the register in the chancery suit, is binding on Hutchinson; he was a party to the bill of foreclosure, and it was certainly necessary in that suit to ascertain the mortgage debt. This was done in the proper manner, and the amount that was thus ascertained, is conclusive on all who were parties to that bill.

2. The material question in this case, however, is, can this action be sustained, to recover for the services of the slaves under the circumstances disclosed by the bill of exceptions? James Jackson owned the slaves, and mortgaged them to the plaintiff. Afterwards, the defendant Hutchinson, the son-in-law of the mortgagor, agreed to take the slaves into his possession and employ them, under the belief that they would be more valuable in his possession, and aid the mortgagor in paying off the mortgage debt; and when this should be done, then Jackson and Hutchinson were to come to some understanding respecting the value and ownership of the slaves.

This appears to be the substance of the agreement, under which Hutchinson obtained the possession of the slaves. Dearing, the plaintiff, was advised of this agreement, and fully assented to it. Upon these facts, can Hutchinson be made liable to the mortgagee, *in assumpsit*, for the services of the slaves? We think the law is well settled, that the mortgagor may hire or lease the mortgaged property, and receive the rents or profits, until the mortgagee give notice to the tenant not to pay to the mortgagor; such notice, however, determines the right of the mortgagor to receive the rents and profits that were unpaid at the time the notice was given, and if the tenant should disregard the right of the mortgagee, and pay to the mortgagor after notice, he must be held liable to the mortgagee, notwithstanding such payment. Moss v. Gallemore, Douglass, 266; Pope v. Biggs, 9 B. & C. 245; Mansony & Hurtill v. The United States Bank, 4 Ala. 735.

In such cases, however, there is an express contract to pay rent or hire to the mortgagor, who is but a tenant at sufferance of the mortgagee, who may approve his acts in leasing the mortgaged premises, and put an end to his right to re-

ceive the rent, *not paid*, by giving notice to the tenant. But in the case before us, there was no specific agreement to pay to any one, any specific amount, yet it is manifest that it was not intended that Hutchinson should have the services of the slaves as a donation; he received them into his possession, that their services might become more valuable, and the mortgage debt thereby more *readily or easily paid*, and the mortgagee assented to this arrangement. As it was not intended to make a gift to Hutchinson of the labor of the slaves, it must have been intended that their labor and services should go towards the extinguishment of the mortgage debt; for the extinguishment of this debt, and the protection of the property for the benefit of the mortgagor, was the leading object of the agreement, by which the slaves came into the possession of the defendant. It must, therefore, have been understood, that Hutchinson should pay for the hire or services of the slaves; for it was not, and could not have been the intention, that he should have such services or hire without paying any thing either to the mortgagee or mortgagor. And this being the nature of the contract, I do not think it material, to inquire whether Hutchinson was to account to the mortgagor or to the mortgagee. For if he was to account for the hire to Jackson, then under the authorities referred to, Dearing, the mortgagee, could interdict payment to him, and claim the value of such hire or services in extinguishment of his mortgage.

But it is insisted that, even if the defendant be liable for the hire, assumpsit is not the proper remedy. I, however, think it clear, that where one has enjoyed the use and profits of property, with the consent and permission of the owner, and from the nature of the agreement it cannot be inferred that the use and profits were intended as a gift, but that the party should account in some mode for the same, assumpsit may be brought, by him who is entitled to such use and profits. This is the substance of the decision of this court, in the case of Davidson v. Ernest, 7 Ala. 817; and it has been followed in several cases since. It was founded on the case of Hull v. Vaughn, 6 Price, 157, and the reasoning of that case, I think, u nanswerable. Indeed, if it be true that by giving notice to the tenant of the mortgagor, the

mortgagee becomes entitled to all the rents unpaid at the time of notice, I can see no other mode in this country to enforce the recovery of the rents *as such*, than by an action of assumpsit, unless indeed it could be done by a bill to foreclose. To bring ejectment, would put an end to the tenancy, and the damages that might be recovered for the detention, would not be rent *eo nomine*, and I very much doubt, when we consider that the mortgagor is entitled to recover the rents, until notice be given by the mortgagee not to pay, whether damages could be recovered for any time anterior to the notice; and all the English cases agree, that the mortgagee, by giving the notice, becomes entitled, not only to the rents subsequently falling due, but also to all rents in arrear and not paid to the mortgagor; and if this be the extent of the mortgagee's right, in my judgment, assumpsit is the most appropriate remedy to recover the rent.

As to the measure of the defendant's liability, under the view we have taken, it is apparent that he was liable for all the hire or profits of the slave, that he had not paid or accounted for, either to the plaintiff or to Jackson, the mortgagor, before notice to the defendant not to pay to him. The charge of the court, therefore, which limited his liability to the time of filing the bill of forclosure, could not in any manner prejudice the defendant, for there was no pretence, that after that period he had paid hire to the mortgagor; indeed, it does not appear, that he ever accounted to Jackson for hire at all.

It is further insisted, that the plaintiff is precluded from recovering, because he might have compelled the defendant to account for the hire, by his bill of foreclosure. Without saying whether he could or not, it is sufficient to say that he did not, and was not compelled to require the defendant to account for the hire in that suit. He had his remedy at law to recover for the hire, and his remedy in equity to foreclose the equity of redemption; and his pursuing the one, is no bar to his right as to the other. Davidson & Stringfellow v. Shipman, et al. 6 Ala. 27, and cases there cited.

The only other point insisted on, is, that the charge of the court was calculated to charge the defendant with the hire of the slaves, even after they were taken from him under the decree of foreclosure. But we cannot indulge the presump-

tion, that either the court or jury for a moment could entertain the idea, that the defendant was liable for hire after the slaves were taken from his possession. The charge bearing on this point, is, that the defendant was liable for hire after the filing of the bill, and notice thereof to the defendant; and we have seen, that under the evidence applicable to this charge, it is not erroneous; at least it cannot be, so far as the defendant is concerned. And if it were thought possible that the jury could have been misled by it, so as to give hire after the slaves were taken from the defendant's possession, it could easily have been prevented, by requesting the court to instruct the jury, that the defendant was not liable for the services of the slaves after they were taken from his possession in obedience to the decree of foreclosure. But it is apparent that no one thought it necessary to call for instructions, informing the jury that the defendant was not liable for hire, after the possession was taken from him; and to suppose that they were misled by the generality to the charge, would be to deny their common intelligence.

After a deliberate examination of all the questions raised in the argument, we are satisfied, that as the case is presented by the record, there is no error, and the judgment must be affirmed.

ALEXANDER ET AL. *vs.* TRASK.

1. In an action of debt on a claim bond, where the plea of *non est factum* is interposed, the sheriff is an incompetent witness for the plaintiff, without a release, to prove the execution of the bond.
2. A return of "forfeiture" is not necessary to the maintenance of a common law action of debt upon a claim bond.
3. If the obligor in the bond is absent from the county, a demand of the property from his general agent is sufficient.

ERROR to the Circuit Court of Coffee.

Tried before the Hon. John Gill Shorter.

This was an action of debt by the defendant against the

plaintiffs in error, on a claim bond which they had given for the trial of the right of property to a certain stock of goods. The defendants pleaded *non est factum*, *nil debet*, and performance. At the trial, the plaintiff offered the sheriff, by whom the bond was taken, to prove its execution. The court overruled the defendant's objection to his competency, and permitted him to testify, to which defendants excepted. Plaintiff, having proved the loss of the original bond, introduced parol evidence of its contents, to which defendants objected, but their objection was overruled by the court. Plaintiff also offered parol evidence of the contents of the execution against the original defendant in execution, after having proved its loss, which evidence was admitted by the court, against the defendants' objection, and they excepted. Plaintiff, further having proved that the court-house of the county had been destroyed by fire, offered to prove by parol the contents of a judgment of condemnation in the original suit, to which evidence likewise the defendants objected, but the court admitted it. Plaintiff also proved that the sheriff had made a demand of the goods of the defendant's general agent, and that the defendant himself was absent from the county at the time of this demand.

The court charged the jury, that this demand was sufficient; and refused to charge, as requested by the defendants, that the plaintiff could not recover unless the bond sued on had been returned "forfeited" by the sheriff. "The matters and things set out in the bill of exceptions" are here assigned for error.

P. T. Sayre, for plaintiff in error:

The court certainly erred in admitting the testimony of Kinney, who was the sheriff at the time of the alleged execution of the bond. It was his duty to take the bond, when the affidavit claiming the property was made; and if he failed to do it, he was liable to the plaintiff in the execution for such failure.

This suit was directly upon the bond, by the obligees in the bond, who were also the plaintiffs in the execution. The question to be tried was, whether the sheriff had performed the duty required of him by the law; that was the issue before the jury, directly made by the plea of *non est factum*.

If the jury found the issue in favor of the execution of bond, Kinney's liability to the defendants in error was gone; he could not then be sued by them for his failure to take the bond; he was then operated upon by the strongest motives of self interest, to establish that result. Although he was not a party to the record, he was a party to the issue.

Under the pleadings the issue was, did the sheriff take the bonds declared on, or did he not. If the jury found in the affirmative, Kinney's liability was gone; but if in the negative, his liability was established.

Kinney then occupied the position of a witness swearing to establish a fact, which, if established, would remove all liability from him. 2 Raymond 1411; ib. 1007; Hayes v. Grier, 4 Binney, 80; Harwood v. Murphy, 4 Halstead, 215; Wood v. Skinner, et al., 6 Paige 76; Rogers v. Deible, 3 Paige 238; McGrew & Beck v. Governor, &c. 19 Ala. R. 89; Moore & Jones v. Henderson, 18 ib. 232; Hunter v. McDusland, 2 Hayw. 366.

The court erred in allowing the contents of the judgment condemning said property to be proved by parol.

In order to authorize the introduction of parol proof, it was necessary first to lay the proper predicate by proving the loss of the minutes; until this was done, the evidence should have been excluded.

Belser & Rice, *contra:*

1. The witness Kinney was competent to testify in the cause. Governor v. Gee, 19 Ala. 199; Moore v. Henderson, 18 Ala. 235; Bean v. Pearsall, 12 Ala. 592. An agent is an exception to the general rule.

2. The parol evidence as to the bond, execution and judgment, was properly admitted. Stewart v. Connor, 9 Ala. 803; Jackson v. Cullum, 2 Blackford 228; Baskin v. Seachrist, 6 Barr 154; Fowler v. Moore, 4 Pike 570; Harkins v. Gustin, 7 Halst. 42; U. S. v. Laub, 12 Peters 1; U. States v. Reyburn, 6 Peters 352.

3. The demand of the general agent of Alexander in his, Alexander's, absence from the State, if a demand was acquired at all, is sufficient. Garnett v. Roper, 10 Ala. 842.

4. It was not necessary that the bond of Alexander, et al.

should have been returned "forfeited." At most, the statute on this subject is merely directory.

5. The bill of exceptions will be most strongly construed against the plaintiff in error, and the court will intend that the necessary evidence was produced in the cause, until the contrary is shown. The evidence ruled in, was at least permissible. Morgan v. State, 11 Ala. 292.

6. No *ground* of objection to the evidence of the contents of the lost record, is stated. All the evidence is not pretended to be set forth showing its loss. And this court cannot say that the *ground* of objection was, that a sufficient predicate was not laid.

CHILTON, J.—This was an action of debt brought by the defendants in error, upon a claim bond given under the statute for the trial of the right of property.

One of the pleas put in issue the *factum* of the bond, and the sheriff was introduced by the plaintiffs below to prove that the bond was executed by the defendants. He was objected to as incompetent, by reason of interest, but allowed to testify without a release; and this constitutes the ground of the first exception.

The general rule undoubtedly is, that a witness who has a direct interest in the event of the suit, cannot be allowed to testify. But this rule is subject to several exceptions, which public policy, convenience and necessity have engrafted upon it, and which are as well established as the rule itself, although not always so easy of application. Among these exceptions are classed agents, factors, brokers, &c. It is supposed by the counsel for the defendants in error, that the sheriff, as respects his ministerial official acts, falls within the exception to the general rule which obtains as applicable to agents; but we are unable to perceive upon what principle he may thus be classed. The same considerations of public convenience and necessity, which apply to agents employed in the transaction of ordinary business, have no application to public officers, who are required to furnish written memorials of their official transactions, and which are *prima facie* evidence, and in some cases, conclusive evidence of those acts.

The cases of Beane v. Pearsall, 12 Ala. Rep. 592, and the

Governor, Use, &c. v. Gee, 19 ib. 199, were cases of agency, which clearly fell within the exception. In the other case cited by the counsel for the defendant in error of Moore & Jones v. Henderson, 18 Ala. Rep. 332, we held, in an action against an attorney to recover upon his receipt for notes for collection, the maker of one of the notes was an incompetent witness to prove the payment of the money to the attorney. And we said in that case, that where, in one event, the liability of the witness will be lessened, he is not a competent witness for the party who seeks by his evidence to produce that event. See the cases there cited on page 235.

So in McGrew & Beck v. The Governor, 19 Ala. Rep. 89, we held, that a constable was an incompetent witness to prove that he had paid money to a justice of the peace, which he had collected on execution, in a suit by the plaintiff in the execution against such justice for the money.

That the sheriff in this case has an interest in fixing a liability upon the defendants on the claim bond, needs no argument; for although a judgment exonerating the defendants might not be evidence against him, when sued for failing to take a bond, yet the judgment fixing the liability of the obligors upon the bond, gives to the plaintiff below all that he can claim, and thus completely saves the sheriff, who is offered to bring about this result by his own testimony.

His position in regard to the cause cannot be distinguished from that of a clerk, who has received a writ of error bond, the genuineness of which is called in question, in a proceeding in equity to be relieved from a summary judgment rendered upon it against the obligors. It has been twice held, that such is the direct interest which the clerk has, that the Chancery Court will not proceed to a decree, without he is made a party. Brooks v. Harrison, 2 Ala. Rep. 209; Gibbs & Labuzan v. Frost & Dickerson, ib. 720–730.

But if we concede that the sheriff is the agent of the plaintiff below to take the claim bond, and subject to the ordinary exception to the general rule applicable to agents, we should still hold him incompetent, upon the ground of interest. For the exception does not extend, to cases where a verdict for the principal would place the agent in a state of security, against any action which the principal might bring

against him, the agent being directly interested in fixing a liability on the defendant, thus securing himself from future amenability. 1 Greenl. Ev. § 396. And this principle, it is said, is applicable to all cases, where the testimony of the witness adduced by the plaintiff, would discharge him from the plaintiff's demand, by establishing it against the defendant. 1 Greenl. Ev. (3 Ed.) note 4 to page 543. So, in an action brought by A. against B., for the board of C., the latter was held an incompetent witness to prove the claim. Emerton v. Andrews, 4 Mass. Rep. 653; Hodson v. Marshall, 7 C. & P. 16.

We are therefore of opinion, that both upon principle and authority, the sheriff was incompetent to fix a liability upon the defendants below, thus rendering himself secure against any action which might otherwise be brought against him. If the plaintiffs below desire the testimony of this witness, they can avail themselves of it, by executing a release; othwise, he is incompetent, as he is liable over, either on an implied agreement, or on the ground of fraud. Baxter v. Graham, 5 Watts, 418; Miller v. Garvin's Ex'r, 12 Ser. & R. 104.

2. This being a common law action upon the bond, no return of "forfeiture" was necessary to its maintenance. Such endorsement is only required, to enable the payee or obligee to avail himself of the summary remedy conferred by the statute.

3. Without deciding whether, under the circumstances presented in the blll of exceptions, it was incumbent on the plaintiff to have made a demand, through the sheriff, of the property which had been condemned, we are satisfied the court did not err in the instruction given to the jury, that the demand proved to have been made of the defendant's general agent, he being absent from the county, was sufficient. If the party to the bond rendered a personal demand upon him impracticable, by his absence, the best the sheriff could do was, to make it of the person having the general charge and agency of his business.

4. As to the preliminary proof, constituting the predicate for secondary evidence of the execution and record of condemnation of the property in the claim case, it is unnecessary for us to say more, than that when the better evidence is

shown to be lost or destroyed, secondary evidence is admissible to prove it. 5 Kinney's Com. 106; 22 Maine, 442. Doubtless, the loss of the better evidence can be sufficiently shown upon another trial, if it be lost.

Let the judgment be reversed, and the cause remanded.

OSWALD *vs.* GODBOLD.

1. The plaintiff cannot recover under the common counts, in assumpsit for use and occupation, when the proof shows that there was a special agreement between the parties, by the terms of which the plaintiff was to receive a specified quantity of lumber for the rent of the premises, and it is not shown that by the agreement any value in money was placed on the lumber.
2. The statute of this State (Clay's Digest 505, § 1) does not embrace those contracts for rent which contain a reservation of rent to be paid in specific articles, the value of which is not ascertained by the agreement of the parties.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. L. Gibbons.

The plaintiff brought an action of assumpsit in the Circuit Court of the county of Mobile against the defendant, and filed his declaration containing five counts.

The first count avers, that plaintiff rented to defendant a saw and grist mill for the year 1845, for which defendant agreed to pay him 150,000 feet of assorted lumber, to be delivered in the city of Mobile; which he failed to deliver, to plaintiff's damage $1000.

The second count is for use and occupation of the mills by the defendant, and an undertaking on his (defendant's) part to pay the plaintiff $1500 therefor.

The third is in *quantum meruit* for use and occupation of the mills, with averment that they were reasonably worth $1500.

The fourth sets out a special contract between the parties as follows: "And whereas the said plaintiff being the owner of a certain saw and grist mill in Mobile county, situated on Cole Creek, with the appurtenances, and the said defendant

being anxious to rent the same from the said plaintiff, the said defendant on the 23d day of January, 1845, in the county of Mobile, in consideration that the said plaintiff, at his, defendant's, request, would rent to him, the said defendant, the said saw and grist mill, with its appurtenances, for one year then next ensuing, and would put the said mill in repair, and keep it in repair during the said year; he, the said defendant, then and there promised to said plaintiff, in consideration thereof, to deliver to him, in Mobile, one hundred and fifty thousand feet of merchantable lumber; and the plaintiff avers, that thus confiding in the said promise of the defendant, he, the said plaintiff, on the day and year last aforesaid, did rent to the said defendant the said saw and grist mill, with its appurtenances, for one year from the said 23d day of January, 1845, and did put the said mill in repair, and kept it in repair for the said year for which it was rented to the defendant, and did then and there do all things which were to be done, and the said defendant then and there went into possession of the said mill, with its appurtenances, and had, used and enjoyed the same for twelve months then next ensuing; yet, the said defendant, not regarding his said promise and undertaking, failed, refused and neglected, although often requested so to do, to deliver to the said plaintiff the one hundred and fifty thousand feet of merchantable lumber, in Mobile, in pursuance to his said undertaking and promise, to the plaintiff's damage one thousand dollars."

The fifth is a mixed count, in which the money counts, generally, are blended.

The breach is for failing to deliver the lumber in Mobile, and failing to pay the money claimed.

On the trial, as appears by the bill of exceptions, the plaintiff introduced evidence proving that one Johnson, (the witness,) a short time before the defendant leased the mill, made an agreement with the plaintiff to lease his mill on Cole Creek, in Mobile county, for one year; he was to give 150,000 feet of merchantable lumber for the rent. Witness stated that lumber at the mill was worth $9 per thousand; the contract between plaintiff and witness was never perfected; the witness further stated that defendant told him, that he (defendant) had rented the mills for one year, on the same

terms that witness was to get them, except that the dam was to be raised; how much witness did not know. The testimony was doubtful, whether the lumber, by the contract, had a fixed value at the mill or not. It was also proved, that the defendant went into possession of the mill in January, 1845, and used it for the year, when he delivered it to the plaintiff.

The plaintiff then offered to prove, under the common counts, the value of the mills for one year by way of rent, and stated, that in such proof he would keep within the amount proved on the special contract. The defendant objected to this proof, and the court sustained the objection, unless the complainant would show that the contract itself contained a rule by which the damages would be estimated; to which the plaintiff excepted.

Defendant then proved, by the millwright who had been employed by the plaintiff to work on the mill during the year, that he heard both plaintiff and defendant say, that the plaintiff was to rent the defendant the mill for a year; that he was to raise the dam two feet and repair the mill, for which, defendant was to give him 150,000 feet of lumber; he also proved that defendant had delivered to the plaintiff nearly 100,000 feet of lumber, and since the lease was out had paid him $125 in cash. He proved that the dam was not raised, and that the mill was only partially repaired; and that the defendant had been damaged to a great extent, on account of the dam not being raised.

The plaintiff, by way of rebutting proof, offered evidence showing that the dam of the mill had been raised two feet, and the repairs made; by another witness, who had been employed by defendant about a week, in the commencement of his tenancy, that the dam had been raised a foot, and he never heard the defendant complain that the dam had not been raised. Plaintiff further proved, that he was frequently at the mills while defendant occupied and used them, was often with him, and never heard him complain that the dam was not raised and the repairs made; he seemed to be satisfied with his bargain.

The plaintiff again offered to prove what the use and occupation of the mills were worth, during the year defendant rented them, and that they were worth fifteen hundred dol-

lars. The defendant objected to the introduction of this proof under the common counts; the court sustained the objection, and the plaintiff excepted.

The court then charged the jury, "that it was left to them to say what the contract was between the parties; that if they found, that it was, that the lumber, by the contract, had a value put upon it at the mill or elsewhere, then they could consider the defendant's and plaintiff's evidence on the common counts, in case such evidence did not support the special count on the contract, and plaintiff would be entitled to recover on said counts if any thing was due him on his contract with the defendant. But if they found the lumber, paid the plaintiff by the defendant, had no fixed value by the contract, then the plaintiff's evidence could not be applied to the common counts, and the plaintiff must recover on his special count on the contract, as declared upon in the declaration" or not at all. To this charge the plaintiff excepted.

The plaintiff assigns for error the matters set forth in the bill of exceptions.

Jno. A. Campbell, for plaintiff in error:

The evidence excluded by the Circuit Court, and the charge given by the court, upon the application of the evidence to the counts of the declaration, were in contradiction to the statute, Clay's Digest 505, title Rent. 1 S. & P. 294; 1 Ala. Rep. 535; 7 Wend. 107; 13 John. 240.

Requier, *contra:*

Where the damages consequent upon the breach of a contract are unliquidated, no recovery can be had upon the general counts, but the plaintiff must stand or fall by his special count. 1 Stew. 12; 3 ib. 190; 7 Ala. Rep. 952; 10 ib. 330; 11 ib. 273; 12 ib. 221; ib. 726.

LIGON, J.—It was not insisted in the argument, that under the state of the pleadings and proof disclosed by the record, the plaintiff in error is entitled to recover on the special contract set out in his declaration; but the error chiefly complained of is, the refusal of the court to allow the proof of the value of the premises by way of annual rent, to go to the jury on the common counts.

In Snedicor v. Leachman, 10 Ala. Rep. 330, it was held by this court, that when the plaintiff declares on the common counts, he cannot recover, if the proof shows there was a special contract between the parties that the plaintiff was to receive specific articles in payment, and this, notwithstanding the testimony concerning the special contract, did not disclose all its terms. The court in that case takes the true distinction between those cases of this class, in which a recovery may be had on the common counts, when a special contract is shown to exist, and those in which it cannot. In that case, it is said, that "the plaintiff may recover on the common counts, although there is a special contract, whenever, by the breach of the contract, the plaintiff is entitled to recover a sum *in numero;* that is, where the damages for the breach of contract are liquidated, and require nothing to be done but a mere calculation."

The same rule had been previously acted on in Sprague v. Morgan, 7 Ala. Rep. 952, and has since, in Aikin v. Bloodgood, 11 Ala. Rep. 221, Anderson v. Rice, at the last term, and several other cases which it is needless to cite; and we have no doubt, it is the true rule in such cases.

In the present case, the proof clearly shows, that there was a special agreement between the parties, by the terms of which the plaintiff was to receive one hundred and fifty thousand feet of lumber for the rent of the mills; but the testimony does not show, that by that agreement any value in money was placed on this lumber, by the hundred or by the thousand feet, so that, by a mere calculation, the jury could ascertain the plaintiff's damage. On such contracts, the law fixes no invariable rule by which the damages are to be measured. If the failure to deliver the lumber had put the plaintiff to no other inconvenience than the mere disappointment arising from such non-delivery, the measure of damages would be, the value of the lumber at the agreed place and time of delivery; whereas, if he were engaged in building, and his workmen were delayed and hindered by such non-delivery, the measure of damages would be increased in proportion to the actual injury sustained. It presents, then, a case of unliquidated damages, and the proof offered by the plaintiff, and ruled out by the court, was clearly inadmissible under the common counts.

The counsel for the plaintiff insists, however, that although the rule alluded to may be considered as the true one in ordinary cases, yet our statutory regulations, in relation to actions for the recovery of rent, will exempt this case from its operation.

That statute provides: "It shall be lawful for any person or persons to whom any rent may be due, or the executors or administrators of such person, when the demise is not by deed, or if by deed, not specifying the rent to be paid, to recover a reasonable satisfaction for the tenements occupied by the defendant, in an action on the case for the use and occupancy of what was held and enjoyed; and if, on evidence on the trial of such action, any parol demise reserving certain rent, or demise by deed, but no rent therein agreed on shall appear, in either case, the plaintiff in such action shall not be nonsuited, but shall recover a reasonable satisfaction for the tenements occupied."

It is evident, that the legislature intended to prevent nonsuits in those cases of parol demise, reserving rent to be paid in money, in which the special agreement between the parties was inartificially set out, or wholly omitted by the pleader in his declaration; and in those in which assumpsit, and not covenant, was brought, when the demise was by deed, which did not ascertain the amount of such rent. It is also evident, that its terms were never intended to embrace those contracts for rent, which contained a reservation of rent to be paid in specific articles, the value of which was not ascertained by the agreement between the parties.

There is nothing in the cases to which we are referred by the counsel for the plaintiff in error, to conflict with these views.

There is no error in the record, and the judgment must be affirmed.

WATTS ET AL. *vs.* GAYLE & BOWER ET AL.

1. A creditor may come into a court of equity against the executor *de son tort* of his debtor, to obtain satisfaction of his debt out of property which the debtor fraudulently conveyed, and which is in the possession of a person who cannot administer it as the rightful representative, being bound by the fraud of the intestate; and in such case, it is not necessary that the creditor should have exhausted his legal remedies, or should stand as a creditor with a lien.
2. As a general rule, all the obligors must be made parties to a suit in equity on an administrator's bond. A demurrer will lie to the bill if all are not made parties, unless a sufficient excuse is shown in the bill for the omission.
3. An allegation of the insolvency of those who are not joined, is a sufficient excuse for the omission.
4. The distributees of the estate are not necessary parties to a bill filed by a creditor against the executor *de son tort* of his deceased debtor, to reach property fraudulently conveyed by the debtor in his lifetime.
5. When the Orphans' Court has acquired jurisdiction of the settlement of an estate, by the report of insolvency, personal notice of the subsequent proceedings to the administrator, is unnecessary; he is considered the actor, and is held to notice of all subsequent proceedings.
6. A decree of the Orphans' Court against an administrator, rendered previously to the passage of the act of 1843, is equally conclusive upon him and his securities, both as to the claims allowed against the estate, and the assets in the administrator's hands; and the securities, in the absence of fraud, cannot litigate any question, except those which may arise upon the *factum* of the bond, or its legal sufficiency.
7. A party against whom a judgment at law is rendered by default, cannot obtain relief against it in equity, upon the ground that the attorney, whom he had retained to appear and defend the suit for him, failed to do so, and appeared for the opposite party, when the proof shows, that he had only requested the attorney to attend to any and all business for him, and had not mentioned any particular case.

ERROR to the Chancery Court of Lowndes.
Tried before the Hon. J. W. Lesesne.

This bill was filed by Gayle & Bower, *et al.* against the plaintiffs in error, as executors *de son tort* of Jeremiah Watts, deceased, who was one of the securities of Margaret West, on her bond, as executrix of Henry West, deceased. The bill charges, that Gayle & Bower held a claim against the estate of said Henry West; that said estate was reported insolvent; that their claim against it was allowed by the Orphan's Court, and a decree rendered in their favor against the administratrix, for the amount; that the other securities of the admin-

istratrix were insolvent; that Gayle & Bower assigned their claim to the complainant, Smith; that an execution was issued on the decree, and returned, "no property found." It also charges, that Jeremiah Watts, before his death, fraudulently conveyed his property, including sundry slaves, to his son, Thomas J. Watts; that said slaves were afterwards sold by Monroe Watts, under the directions of said Thomas J. Watts; and that there is no other property belonging to the estate of the said Jeremiah Watts. The bill prays for an account, and that said Thomas J. and Monroe Watts be decreed to pay the complainants' demand out of the money received from said sale.

The defendants, Thomas J. and Monroe Watts, insist, in their answers, by way of defence, that the said claim of Gayle & Bower, which is the foundation of the suit, was paid before the rendition of said decree by the Orphans' Court, against the administratrix of Henry West; and that their intestate, Jeremiah Watts, ought not to be concluded by said decree, because the said administratrix had no actual notice of the same. They also insist, that said decree ought not to be conclusive against their intestate, on the ground of accident, and state these facts to avoid it: that said Watts had employed an attorney to attend to said settlement for him, and to see that the same was properly made; and that said attorney, instead of appearing for said Watts, and representing his interest, appeared for said Gayle & Bower; that, at the time of said settlement, said Watts was prevented by sickness from attending in person, and also, that he was prevented, by mental derangement, from ascertaining and setting up his defence.

A demurrer was also filed to the bill, for want of equity, for want of proper parties, and on the ground that complainants had a full, adequate, and complete remedy at law.

The evidence shows, that the estate of Henry West was duly reported insolvent, and that notice of the settlement was given by publication. It also shows, that the execution against the administratrix was made returnable to the Orphans' Court, instead of a regular term of the County Court; that Margaret West was insolvent, as also those of her secucurities who are not made parties to the bill. The evidence upon the other points of the case appears in the opinion.

The Chancellor rendered a decree, upon the bill, answers, and testimony, referring it to the master to take an account of the amount due on the decree in the Orphans' Court, and of the estate in the hands of Thomas Watts, that the same might be condemned to the payment of said decree.

The decree of the Chancellor is here assigned for error.

LAPSLEY & HUNTER, and BOLLING, for plaintiffs in error:

1. The execution which issued from the Orphans' Court on the decree against the administratrix of West, having been made returnable to a day of the Orphans' Court, fixed no liability on Jeremiah Watts, *et al.*, the securities of the administratrix. It is the same as though no execution had issued against the administratrix. Westmoreland v. Hale, 11 Ala. Rep. 127; Graham & Abercrombie v. Chandler, 12 ib. 829.

2. Before a suit, even, can be maintained against the securities of an executor or administrator, it must appear, that assets have been found in the hands of the latter, and that the money alleged to be due cannot be made. 3 S. & P. 263; ib. 348.

3. The security is liable, only when the remedy has been exhausted against the principal. 2 Dev. Eq. 115; 7 B. Monroe, 15. There should have been an execution returned, "no property," against the administratrix.

4. After the securities are liable to an action, they can only be charged, to the extent of the assets actually wasted. 11 Ala. Rep. 104. It was incumbent on the complainants, to have shown the value of the assets which came to the hands of the administratrix of West. Evidence of the decree is not sufficient, *especially* when it is also shown that the estate is not able to pay it.

5. If the Orphans' Court decree was not void for want of notice, it was clearly only *prima facie*, as there was no personal service on any one. 2 Stew. Rep. 399; 2 ib. 445; ib. 124; ib. 280; 4 Cow. 292.

6. The surety was mentally and physically unable to defend, and for that reason, is not concluded by the decree against the administratrix. To show this, we hold, 1st, That he had the right to defend, and his liability upon the Orphans' Court decree depends upon that right. 2. That the imbecility is a

good ground to open the judgment, to let in evidence of payment by the administratrix before its rendition. 1 Brock. 33.

7. Independent of this, there was such accident as will open the judgment, as to Jeremiah Watts. The accident was, that his counsel, by an oversight, appeared in the Orphan's Court against him, instead of for him. This is clearly sufficient, of itself, but, combined with the imbecility, places the matter beyond doubt. It was in the nature of a fraud in Gayle & Bower, to press their whole demand and get a decree for all, under the peculiar facts of this case.

8. If proof is let in as to payments before the decree in the Orphans' Court, then the evidence of Smith shows, that the debt, or nearly all of it, has been paid. The amount of Smith's notes, for property purchased at the sale, went in payment of the debt.

9. The complainants cannot maintain the present bill. There is no equitable lien; no judgment against Jeremiah Watts. 7 Ala. Rep. 319, and authorities there cited. There is yet no debt against Jeremiah Watts. *Quere?* Can the bill be sustained, under the statute? The proceeding should have been against the assets of the estate of West. It starts out with the idea, that there is a debt against Jeremiah Watts, to the amount of the decree, and seeks to collect the assets of Jeremiah Watts out of the defendant, T. J. Watts, by making him an executor *de son tort.* If the complainant is correct in this, the heirs or distributees of Jeremiah Watts should have been made parties. 16 Ala. Rep. 233.

George W. Stone, *contra:*

1. The decree against Mrs. West, the administratrix, being a judgment, clearly fixes her liability, and the extent of it. Our statutes and decisions make the decree equally conclusive against her sureties, except as to the *factum* of the bond, and their legal liability on it. On all other grounds, they can make defence only through their principal. 4 Ala. Rep. 417; ib. 693; 5 ib. 67; 6 ib. 826; 20 Pick. 58; 9 Ala. 42.

2. Such creditor, or even a creditor at large in many cases—and this is one of them—may file a bill for the discovery and administration of assets; and, obtaining the discovery, the court will proceed to decree payment. 11 Ves. 29;

4 Johns. Ch. 619; 8 Por. 380; 9 Ala. 391; 15 ib. 91; 13 ib. 140; 3 Littell, 427; 1 Sim. & Stu. 206.

3. In cases like the present, a bill for such object will equally lie against an executor *de son tort.* 9 Leigh, 79; 7 Sim. 172; 10 Con. Eng. Ch. 1; 8 Por. 271; 3 Lit. 427; 6 Johns. Ch. 132; 2 Rand. 384.

4. The defendants have made themselves executors *de son tort.* 1 Lomax on Executors, 77; 5 Ala. Rep. 31. And even if there were a rightful executor, he could not recover the assets; and hence our right to proceed in this form is clear. 6 Ala. 367; 2 Rand, *supra.*

5. The decree or judgment is conclusive against Mrs. West and her sureties, and cannot be set aside, or reheard in equity, unless the Wattses have averred, and *proven*, that they were prevented from making the defence by accident, unmixed with negligence, or the fraud of the opposite party. Is that species of accident which is unmixed with negligence, shown here? 6 Por. 24; 7 ib. 549; 1 Ala. Rep. 351; 3 ib. 521; 14 ib. 345; 2 Hen. & Munf. 139; 2 Story's Eq. Jur. §§ 887–888–896; 1 Sch. & Lef. 201; 6 Johns. Ch. 479; 3 Johns. Ch. 351.

6. And it is not enough, to show a right to have the case reheard, on the ground of accident or fraud. It must also appear, that the decree is inequitable and unjust. 2 Munf. 1; 8 Ala. 770.

7. The other ground of defence is, the mental imbecility of Jeremiah Watts. The law knows no middle ground between sanity and insanity, or capacity and incapacity to do binding acts. Unclouded intellect is not required. If the party have sufficient intellect to attend to his ordinary affairs, it is enough. 5 Ala. Rep. 81; 11 ib. 87; 11 Ves. 11; 5 John. Ch. Rep. 148, 161; 4 Cow. 207; 1 Jarman on Wills, note, (1st ed.) 27; 1 Phil. 100; 1 Jarman on Wills, 31; 9 Pick. 212.

8. Neither of these grounds of defence can derive any support from the other. Each must stand by itself; and if neither is sustained, both must fail.

9. We contend, that neither of these defences is made out; but if the court should think either one proven, then we say no injury has been shown. The testimony of Smith is contradicted in many important particulars, and is incredible.

Moreover, it is not shown, if Gayle & Bower did receive these notes, that they were a payment on the decree in this case. The presumptions are in favor of the correctness of the judgment; and the onus lies on the Wattses, to show, that they were received on the indebtedness which was the foundation of the decree of the Orphans' Court.

10. It was not necessary for us to prove the correctness of our account. The onus was on the other side to disprove it. Yet we have taken the testimony of Hayne & Miller to establish it, by proving the handwriting, and correct dealings of the deceased clerk, who made the entries. 9 Por. 289; 4 Ala. 371; 8 ib. 519.

11. As to the transfer of the judgment, either partner, while the firm continues, or the continuing partner, after the dissolution, is authorized to transfer the firm effects in payment of its debts. 3 Paige, 523; 15 Ala. Rep. 34.

12. The Wattses, in attempting to attack our decree, are forced to become actors, and to pray for relief. This, they cannot do without a cross bill. Story's Eq. Pl. §§ 430–431–425–429; McLemore v. Mabson, at this term.

13. Our bill is well filed under the statute, and is good, independent of it. Pamph. Acts, 1844, 107; 10 Ala. 436; 11 ib. 988; 13 ib. 837; 14 ib. 198; 1 Paige, 637; 20 Johns. 554. It is also filed, so as to come within the provisions of the act providing for attachments in chancery, §§ 1 and 3 Pamph. Acts of 1846, 17.

14. If it be contended, that in this case we have no execution returned unsatisfied, we answer, that the equity of our bill is defensible on other and distinct grounds. Jeremiah Watts had fraudulently disposed of his entire estate, and the property had been carried beyond the jurisdiction of the court. The assets were in money, and were in the hands of Thomas J. Watts, the executor *de son tort*. Jeremiah Watts was dead. No administration on his estate had been taken out, and none was necessary. The power of the chancellor was needed to vacate the fraudulent bill of sale, and discover the assets, and make them available. Being in possession of the case for this purpose, the court of chancery will retain it, and do complete justice. See Chamberlayne v. Temple, *supra*, and other authorities.

15. The answer and the proofs show, that Mrs. West and the other sureties were utterly insolvent. Hence, no proceedings against them were necessary.

16. It cannot be necessary to make the other distributees of Jeremiah Watts parties. No effort is made to separate the shares of the distributees; and hence no account between them is necessary. We proceed against them as executors, and seek to charge them as having in their hands assets of the said Jeremiah Watts.

17. The decree of the Orphans' Court of Butler, which is the foundation of this proceeding, and all that precedes it is regular, as has been determined in the case of Clarke v. West, 5 Ala. Rep. 117. That decision, so far as it goes, is the law of this case.

GOLDTHWAITE, J.—This is not a case where a creditor seeks to obtain satisfaction of his debt out of the property of the defendant which cannot be reached by an execution at law, in which case, the right of the creditor to obtain relief, depends upon the fact of his having first exhausted his legal remedies, without being able to obtain a satisfaction of his judgment, (Hadden v. Spadder, 20 John. 554; Beck v. Burdett, 1 Paige, 388; Roper v. McCook, 7 Ala. 319.) Neither is it the main object of the bill, to remove an obstacle which stands in the path of the complainant in enforcing a lien, in which case he must, in order to entitle himself to the aid of equity, show himself to be a creditor with a lien, by obtaining judgment, and placing his execution in the hands of an officer. (Planters' and Merchants' Bank v. Walker, 7 Ala. 926; Dargan v. Waring, 11 Ala. 928; Pharis v. Leachman, at the present term.) The object of the complainant in the present case is, to enforce a claim against property which, it is alleged, has been fraudulently conveyed by an intestate in his life-time, and which is in the possession of a person who cannot administer it as the rightful representative, being bound by the fraud of his intestate, (Marler v. Marler, 6 Ala. 367; Pharis v. Leachman, *supra*) and which is the only property that remains for the satisfaction of the debt, the intestate having left no assets. The principle which is asserted by the bill, that a creditor may come into a court of chancery against

the personal representative, was asserted at an early period in the English courts, (1 Story's Eq. §§ 530, 546, and cases therein cited) and has been frequently recognized in this court; (Leavins v. Butler. 8 Port. 380; Blakey v. Blakey, 9 Ala. 391; Dement v. Boggess, 13 Ala. 140; Hunley v. Hunley, 15 Ala. 91;) and the principle applies equally to an executor in his own wrong, as to the rightful administrator. (Chamberlayne v. Temple, 2 Ran. 384; Hansford v. Elliott, 9 Leigh, 79; Newland v. Champion, 1 Ves. 105; Pharis v. Leachman, *supra.*) As it was not necessary for the creditor to have exhausted his legal remedies, or to stand as a creditor with a lien, in order to entitle himself to the assistance of a court of chancery, the allegation of the issue of the execution, and the return of no property upon the execution, was, for either of these purposes, entirely unnecessary, and need not be proved.

As to the other questions presented by the demurrer to the bill, it is true, that, as a general rule, to maintain a suit in equity on an administrator's bond, all the obligors must be made parties, (Moore v. Armstrong, 9 Port. 679); and a demurrer would lie on this ground, unless a sufficient excuse is shown in the bill for the omission. The allegation, however, in the bill, is equivalent to a charge of insolvency, as against all the other parties; and the objection on this ground cannot, therefore, prevail. Neither is it necessary, in a bill of this character, to make the distributees parties. In the case of Hartley v. Bloodgood, to which we have been referred by the counsel for the plaintiffs in error, the object of the bill was, to subject the share of a distributee to the payment of a creditor; and it was there correctly held, that the proceedings being directed against the distributee, as such, the other distributees were directly affected, and should have been brought before the court. The case of a creditor pursuing the personal assets is, perhaps, an exception to the rule; but be this as it may, it is well settled, both in England and this country, that in such case, the complainant may stop short at the personal representative. (Hollord v. Prior, 1 Mylne & Keene, 237; 7 Eng. Con. Ch. R. 22; Newland v. Champion, *supra;* Wiser v. Blackley, 1 John. Ch. R. 437; Story's Eq. Pl. 100, note 2.) If such be the rule as against the personal assets of the estate,

a fortiori must it prevail where the object of the bill is, to reach property fraudulently conveyed by the intestate, and to which the distributee can have no claim as such, being bound by the fraud of his intestate.

As to the decree of the Orphans' Court against the administratrix, no personal notice was necessary, and, in the absence of fraud, the decree must be regarded as conclusive. By the report of insolvency the court acquired jurisdiction, and after that time the administrator is considered as the actor, and held to notice of all subsequent proceedings. (Clarke v. West, 5 Ala. 117; Caruthers v. Ross, 18 Ala. 110.) The judgment being conclusive against the administratrix, the rule is, that it is equally so against the securities, who, in the absence of fraud, cannot litigate any questions, except those which may arise upon the *factum* of the bond, or its legal sufficiency. (Williamson v. Howell, 4 Ala. 693; McClure v. Colclough, 5 Ala. 65; Perkins v. Moore, 16 Ala. 10; Lamkin v. Heyer, 19 Ala. 228.) And the decree is conclusive, not only as to the demand of the plaintiff, but equally so as to the assets in the hands of the administrator. This result follows necessarily, from the decision in Clarke v. West, and Caruthers v. Ross, *supra*, holding that the effect of the report of insolvency, under the laws in force prior to the act of 1843, was, to divest courts of law of the jurisdiction of suits against the administrator, and confer upon the Orphans' Court the power to make distribution of the assets amongst the creditors. This power renders it necessary for the court to ascertain and determine the assets, as well as the demand; and the judgment of the court is equally conclusive upon each of these subjects.

It is, however, insisted, that the intestate Jeremiah Watts was not concluded by the decree of the Orphans' Court; that, if living, he could have claimed the protection of a Court of Chancery, for the purpose of letting in a defence, which he was prevented from setting up at the time of its rendition by accident, as well as mental derangement, with which disease he was at that time afflicted. The rule allowing parties to appeal to chancery against a judgment in another court, is of great strictness and inflexibility, and it is necessary that it should be so, as otherwise, the jurisdiction of that court would

soon supplant that of all other tribunals. (French v. Garner, 7 Port. 459.) A court of equity, therefore, will not lend its aid, unless the party claiming its assistance can impeach the judgment by facts, or on grounds, of which he could not have availed himself, or was prevented from doing it, by fraud or accident, or the act of the opposite party, unmixed with negligence or fault on his own part. Duncan v. Lyon, 3 John. Ch. 351; French v. Garner, *supra.*

The ground of accident relied on in the present case is, that Jeremiah Watts employed an attorney to attend to, and represent his interests on the final settlement of the estate of Henry West, and that instead of representing his interests, he, on that occasion, represented the claim of the defendants in error. Waiving the question as to whether the defendants could set up these facts in their answer by way of defence to the bill, or whether they should not have overhauled the judgment by filing a cross bill, we are clear, that the proof to sustain this allegation is not sufficient to bring it within the rules before referred to. The only diligence which is shown by the record to have been used by the intestate, was the speaking to an attorney, to attend to any and all business which he might have in any court. No definite instructions as to the defence were given—no particular case even mentioned—and it would not, we apprehend, be contended, that a Court of Chancery, upon this evidence alone, would, in the failure of the attorney thus employed to attend, be authorized to overhaul the judgment. To allow this, would be to encourage inattention and neglect on the part of the client, a cause which should furnish no ground for relief. Bateman v. Willoe, 1 Sch. & Le. 201.

In relation to the other ground upon which the opening of the judgment of the Orphans' Court is urged, it may be remarked, that the evidence of but one witness is relied on, and standing by itself, we do not consider the testimony of this witness as amounting to full proof of any actual or positive derangement, until after the severe illness with which Mr. Watts was affected in July, 1842, after the rendition of the decree. He speaks, it is true, of his mind being affected in the year 1839, or 1840, so as to incapacitate him from any *great* mental exertion, and from attention to important busi-

ness, but leaves us entirely in doubt as to the real extent to which his faculties were impaired. It is also rather singular, that this witness does not state a single fact upon which his opinion is based, except the failure of his memory, which is incidentally alluded to. We, of course, would not be understood as intimating that it is necessary, in every case, to give the facts upon which a professional opinion is founded; but in cases of this character, it is more satisfactory to do so. That his memory was impaired, is a circumstance by itself which is entitled to but little consideration, as this faculty is usually the first to feel the effects of age, and may frequently be seriously impaired, without materially weakening the powers of the judgment or understanding. Again: it devolved upon the plaintiffs in error to show clearly, that the condition of mind of their intestate was such as to reasonably account for his failing to make the defence. The person in relation to whom this proof is to be made, is a man of family, living for years in the community, and, during the whole of this time, managing his business, disposing of his property, not leading a secluded or isolated life, but, as far as we can form an opinion upon the whole testimony, occupying the relations to the neighborhood in which he resided which are usual with men of his position. It is incredible, that if the mind of a person thus circumstanced had been seriously affected for any length of time, it would not have been generally known in the community of which he was a member; and that but one witness is introduced to prove a fact of peculiar character—a fact which must, if it existed, have been known to other witnesses—is of itself entitled to great weight. Without, however, pursuing this subject further, it is sufficient to observe, that, taking into consideration all the evidence upon this point, it leaves the question at issue involved in too much doubt and uncertainty, and produces no conviction on the mind, that the failure to prepare and make the defence was attributable to the causes assigned by the plaintiffs in error.

No just reason, therefore, appearing upon the record, to authorize the letting in of the defence to the judgment, and the same being conclusive, not only against the administratrix of Henry West, but also against her securities, and the

proof upon the other points being full, the decree of the Chancellor must be affirmed, with costs.

LOUGHRIDGE *vs.* THOMPSON.

1. When the plaintiff declares in assumpsit on a special contract, by which the defendant agreed to serve as pilot during the boating season on a certain steamboat, and also adds the common counts, it is competent for the defendant, under the plea of the general issue, to show a contract different from that declared on.
2. A motion to exclude testimony, of which a part is admissible, may be overruled.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. John Bragg.

This was an action of assumpsit, brought by Loughridge against Thompson, for services performed as a pilot on board a steamboat of which the defendant was one of the owners.

The declaration sets out a special contract to act as pilot on board the steamboat "8th January," for the boating season, to-wit: from 1st November, 1848, to 1st May, 1849, for $1200. A count on a *quantum meruit* and other common counts are added for services as pilot on the "*8th of January.*"

The pleas are, first, the general issue, and second, payment.

The plaintiff introduced evidence tending to support his declaration. The bill of exceptions then proceeds in these words; "Defendant introdueed G. W. Cloudis, who proved that while he was at New Albany, Indiana, in the summer of 1849, (this is a manifest mistake for 1848,) he wrote a letter by instructions from the defendant, then with him, to Campbell, Owen & Co. of Mobile, requesting them to employ the plaintiff to run as pilot on the steamer "*8th of January,*" or the "*Aberdeen,*" as his services might be required on either by the owners, the same persons being owners of both boats; that witness had no interest in said boats, or either of them; that after witness returned to Mobile, and immediately after

the "*8th of January*" was laid up, witness, who was captain of the "*Aberdeen,*" went to plaintiff, and required him to go on board the Aberdeen, and finish his season as pilot. Upon this demand being made, the plaintiff acceded to it, and promised to finish his season as pilot on the Aberdeen; that when the Aberdeen had received her freight, and was ready to start up the river, the plaintiff refused to go, alleging that he had the cholera; that plaintiff was then drunk, and that witness, in consequence thereof, was compelled to employ another pilot; that on the succeeding trip of the Aberdeen, plaintiff was drunk, and unable, from intoxication, to go on board and act as pilot, and never rendered at any time during the season, any services as pilot on board of said boat."

There was proof that $224 had been paid to plaintiff for his services on the *8th of January* up to the 5th January, 1849, at which time the said last mentioned boat was laid up for the season, and the hands discharged; also proof that plaintiff acknowledged himself indebted to defendant $30 for iron.

To the admission of all the testimony contained in the foregoing abstract from the bill of exceptions, "in regard to plaintiff's agreement to serve on the Aberdeen after he had been discharged from the *8th of January*, plaintiff excepts as irrelevant."

The court charged the jury:

1. That it would be their duty to ascertain what was the true contract between the parties. If the contract was an entire one, to serve on a particular boat, then in the event of its being first broken by the captain or owners of the boat, the plaintiff would be absolved from performing his part of it, and would be entitled to recover the whole amount agreed to be paid for the season.

2. That if the jury should be of opinion that plaintiff's contract was confined to a particular boat, and he had been prevented from complying with it, his subsequent promise to serve on the Aberdeen would not be binding on him, without some new consideration.

The admission of the testimony aforesaid, and the charges of the court, are assigned for error.

O. S. Jewett, for plaintiff in error:

The testimony of said witness in relation to the services upon the Aberdeen, was irrelevant, and not admissible under the general issue; because, nothing shall be given in evidence which does not directly tend to the proof or the disproof of the matters in issue. State v. Wisdom, 8 P. 511; Greenl. on Ev. p. 58 §§ 51–2.

When the defence in any way admits the plaintiff's cause of action, and seeks to avoid it by matter *aliunde*, the matter of defence must be raised by plea. 3 McCord, 317; see Brewer v. Strong's Ex'rs, 10 Ala. Rep. 966; Saunders' Pl. and Ev. 137, and cases there cited.

Even if the evidence in this case was admissible under the general issue, still it did not amount to an alteration of the former contract, or a release of the defendant, and a discharge of his liability. It was nothing more than an agreement on the plaintiff's part, subsequently to his discharge, to run the balance of the season on another boat. Such an agreement cannot be construed into a release of the existing liability, or a substitution of a new contract for the old one.

The error complained of is, that the court permitted this evidence to go to the jury, under the instruction that it rested with them to say what the contract was. The jury may well have thought that the evidence of the captain of the Aberdeen was properly before them, for the purpose of showing what the original contract was.

A party shall not be permitted to offer evidence irrelevant to the issue, or incompetent, when excepted to, for there is great danger that it may bias the jury; and this result may happen, even though the court should afterwards, in its charge, tell the jury not to consider it.

Percy Walker, *contra:*

There is no error in the record to authorize a reversal. The defence made below was perfectly legitimate, under the issues joined. Considering the form of the declaration, the plea of the general issue enabled the defendant to show that the contract sued on was an entire contract. 1 Saunders on Pl. and Ev. pp. 152–3.

An agreement to serve a specified time is an entire contract; and if the party leaves before the termination of the

time, he cannot recover. 1 Stew. 29; 12 Johnson, 165; 3 Ala. 440–676; 13 Johnson, 53. The case in 12 Johnson shows, that the plea of the general issue is sufficient to allow the proof upon which the defence rested in this case, to come in. We might admit that the testimony of G. W. Cloudis, as to the contents of the letter, was not strictly admissible, without at all weakening the case of the defendant in error; for the reason that it could not have misled the jury, inasmuch as the same witness proved the acts and declarations of the plaintiff in error, which clearly proves that he considered that he had been engaged for a specified time; thus bringing the case under the rule laid down in the cases cited above from the decisions of this court.

That this court will not reverse a case for an immaterial error, or one which does not work a prejudice to the party, has been repeatedly adjudged. The plaintiff in error cannot with reason complain of the charges of the court below, because they could scarcely have been put in terms more favorable to him.

PHELAN, J.—It is argued, that the evidence objected to was inadmissible under the plea of the general issue. The plaintiff declared on a special contract, to serve as pilot on a particular boat for a season, at certain wages; and also added the common counts for work and labor, &c. He introduced evidence tending to support his special contract. Now the evidence introduced by the defendant goes to show, that the contract was different from the special contract declared on, and that it was to serve on either one of two boats as he should be required, and that, when required, plaintiff neglected or refused to serve on one of them. This was surely in strict keeping with his plea, "that he did not assume in manner and form as the plaintiff hath declared against him;" he was showing that he assumed in a *different* way. The testimony was entirely relevant and proper under the general issue.

There was a portion of the testimony which, if properly objected to, ought to have been excluded; that portion which speaks of a letter from the witness Cloudis, by authority of defendant, to Campbell, Owen & Co., instructing them to em-

ploy the plaintiff. It was not shown that any employment was ever contracted for pursuant to such letter, and this was reason enough to exclude that part of the testimony upon a proper motion to that effect. But the motion to exclude was made to all that went to show that plaintiff was employed to act as pilot as well on the Aberdeen as on the "*8th of January;*" and a general motion to that effect was properly overruled, for the reason, that the testimony to that point, as has just been shown, was relevant and proper.

In view of what has been already said, it is needless to go further, than to add, that the charges given by the court correctly set forth the principles of law applicable to the facts of the case.

There is no error in the record, and the judgment below is affirmed.

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ACCOUNT.

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   2. That the registration of his deed by the purchaser, coupled with the complainants' failure to have the written evidence of their claim spread upon the records of the county, did not add any potency to the purchaser's title which it would not otherwise have possessed.
   3. That if complainants advanced the purchase money, and P. acted in the purchase, not for himself individually, but as the partner or agent of the complainants, the complainants were entitled to equitable relief against P., or a purchaser claiming under him, who could only succeed to his rights.
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2. When judgments are impeached and sought to be set aside in equity for fraud, the plaintiffs in such judgments are indispensable parties to the bill, and no decree can be rendered in favor of the complainant, without making them parties..... 200

3. Where two defendants, who are neither partners in interest, nor privies in estate, are charged to be jointly concerned in the perpetration of fraud, the answer of one cannot be read as evidence against the other..... 200

4. When an account is called for by the bill, and given in the answer, it must be regarded as responsive matter, and as *prima facie* evidence of the state of accounts between the parties..... 200

5. When several complainants join in a bill, asking relief against a judgment at law, against which some of them show no ground for equitable relief, the bill is demurrable.—Tucker et al. v. Holley et al..... 426

6. A person asking equity must offer to do equity..... 426
7. An appeal does not lie from an interlocutory order of the Chancellor refusing to dismiss a bill for want of equity.—Benford v. Daniels..... 445
8. Nor will the Appellate Court take jurisdiction of such an appeal by consent of the parties..... 445
9. New matter, which has arisen or been discovered after publication of testimony has passed in the original suit may be brought forward by bill of review.—Cochran v. Rison..... 463
10. The objection that the original decree has not been obeyed or performed, cannot be raised by general demurrer to a bill of review, filed for the purpose of annulling or reversing it. The objection can go only to the propriety of filing the bill, and not to the equity of it when filed..... 463
11. The Chancellor has the power, under the statute of this State, to direct the decree on the original bill to be stayed in such manner as he may deem advisable; or he may allow the bill of review to be filed and let the complainant proceed with the execution of the original decree..... 463
12. An agreement entered into between the complainant and one of the defendants after publication of the testimony has passed, whereby the complainant, for a valuable consideration paid him by said defendant, agrees to proceed no further against him in the original suit, and reserves his right to proceed against the other defendant, is good matter for a bill of review, and entitles said defendant to relief against the original decree..... 463
13. Upon a bill filed in the Court of Chancery for the distribution of an estate, if one of the distributees dies after the commencement of the suit, it must, as a general rule, be revived against his personal representative; and a failure so to revive will be error, although the objection is not raised in the court below.—Frowner et al. v. Johnson et al..... 477
14. The answer of a corporation not being under oath, the same amount of evidence is not required to disprove its denials as in other cases.—State Bank v. Edwards and Walke..... 512
15. A creditors' bill, filed by the beneficiaries, for the settlement of a deed of trust executed by the debtor, which required that the secured creditors should assent to its provisions within six months, must allege that the complainants assented to the deed.—Colgin et al. v. Redman et al..... 650
16. An allegation that the complainants "have consented to the provisions of said deed," is sufficient, although the deed requires that they should assent to it "*within six months.*"..... 650
17. The rule which requires a dismissal of the whole bill, if any one or more of several co-complainants fail to make out their case, has never been applied with any stringency to creditors' bills; and unless a misjoinder of such complainants will affect the propriety of the decree, the objection will not be allowed to prevail in any case, when taken for the first time at the hearing..... 650
18. Even if the objection for misjoinder of complainants were allowable in cases of creditors' bills, it should be interposed by way of demurrer; and the cases are exceedingly rare, if they exist at all, in which demurrers to creditors' bills for misjoinder of complainants will be sustained..... 650
19. Orders for the examination of a defendant as a witness for the complainant are made as matters of course, reserving the question of his competency to be made at the hearing; and there is no rule requiring an affidavit to be previously made of his want of interest..... 650

20. Where the defendants claim the benefit of the statute of non-claim by way of plea, but do not positively deny in their answers the presentation of complainant's demand, proof of presentation by one witness is sufficient. Pharis et al. v. Leachman, Adm'r, et al. 662
21. In a suit against an administrator, his admissions of the presentation of the demand are sufficient to take the case out of the statute of non-claim, although such admissions are made after the lapse of eighteen months from the grant of letters of administration 662
22. Where the suit is in chancery, for the purpose of subjecting to the payment of the intestate's debts, property which is standing in the name of a trustee for the benefit of his wife and children, and which is alleged to have been purchased by the intestate with his individual means, and fraudulently added to the trust estate, the admission by the administrator of the presentation of the complainant's demand is evidence, not only against the administrator, but also against the *cestuis que trust* 662
23. The objection cannot be raised for the first time in the Appellate Court, that the order of publication against non-resident defendants was not accompanied by an abstract of the bill, as required by the seventeenth rule of Chancery Practice.—Gannard et al. v. v. Eslava et al 732
24. Where a vendor conveys with covenant of warranty, and his vendee afterwards conveys portions of the land, with covenants of warranty, to two others, retaining a part himself, and the three are evicted of an undivided third part of the land by title paramount to that of the original vendor, they may join as complainants in a bill against him, to reimburse themselves for the loss sustained by the breach of his warranty 732
25. It is a general rule in equity that relief cannot be granted upon matters which are not alleged in the bill, although they may be proved, and that every material allegation must be put in issue by the pleadings. The decree must be predicated upon *the allegations and the proof*, between which there must be a substantial conformity.—Paulding v. Lee and Ivey.. 753
26. Where a bill is filed to enforce an express trust, alleged to have been created by the agreement of the defendant to receive and collect claims, *for the security of a demand due the firm of R., S. & Co.*, proof of an agreement made by the debtor of R., S. & Co. with the defendant, that the latter should receive and collect certain claims, and should pay the proceeds *either to the debtor himself, or to three firms of which R., S. & Co. was one*, does not sustain the allegations of the bill 753
27. As a general rule, all the obligors must be made parties to a suit in equity on an administrator's bond. A demurrer will lie to the bill if all are not made parties, unless a sufficient excuse is shown in the bill for the omission.—Watts et al. v. Gayle & Bower et al 817
28. An allegation of the insolvency of those who are not joined, is a sufficient excuse for the omission 817
29. The distributees of the estate are not necessary parties to a bill filed by a creditor against the executor *de son tort* of his deceased debtor, to reach property fraudulently conveyed by the debtor in his lifetime 817

CHARGE OF COURT.

1. In a criminal prosecution it is error for the court to charge the jury, that if the proof left the question of the guilt or innocence of the accused in equipoise, they could not, on that account alone, acquit.—Winter & Scisson v. The State 39

2. A charge which asserts, "that it requires an express promise, or something equivalent to an express promise, to revive the original cause of action after the statute has effected a bar," is erroneous; because it admits of two constructions, one of which asserts an incorrect legal proposition. Ross v. Ross..... 105
3. It is not the duty of the court to modify or give precision to a charge requested by counsel; but a charge may be properly refused. if it admits of two constructions, one of which asserts an incorrect legal proposition.... 105
4. In assumpsit by plaintiff against his commission merchants, to recover damages for losses on cotton, plaintiff introduced proof of a conversation betwen himself and defendants, for the purpose of showing that he had instructed them to sell his cotton and not to hold it. *Held,*
That the fact of instructions must be determined from the whole conversation, as brought out on direct examination and cross examination; and that the court properly refused to instruct the jury upon the effect of a particular portion of it only.—Ward v. Winston & Co..... 167
5. In detinue against the sheriff, where fraud in the execution of the deed under which the plaintiff claims is relied upon as a sole defence, and no evidence necessarily tending to raise a presumption of fraud, or to prove fraud itself, is offered on the trial, it is not error for the court to instruct the jury "that the matters in proof did not make out a case of fraud.... 167
6. On the trial of an action for the false warranty of a slave, plaintiff introduced as a witness a physician who had beeen practicing eleven or twelve years, and who testified that he had prescribed for the slave for a month or two, and had given him a thorough examination, and that his opinion, formed from such examination, was, that he was unsound at the time of the sale. It also appeared, that another physician, who had been practicing seventeen or eighteen years, had been called in to the slave about two months before the witness, and had attended him for a time, but had removed to an adjoining county. Plaintiff did not call him as a witness, nor was any reason assigned for the failure to call him. *It was held,*
That the court properly refused to instruct the jury, on request of defendant, "that if they believed plaintiff had a skillful physician attending the slave before witness was called in to him, and his attendance at court could have been obtained, but plaintiff had not procured it, nor given any reason why he had not done so, that this was a circumstance which they ought to consider, in determining whether or not the testimony of that physician, if he had been produced, would not make against the plaintiff."—Patton & Burgen v. Rambo..... 485
7. Where there is no conflict in the testimony, the court may, on the request of either party, charge the jury that, if they believe the evidence, they must find for that party.—Bryan v. Ware et al..... 687
8. The Appellate Court will not reverse on account of a charge which asserts a correct legal proposition, although it may be objectionable from its generality. It is the duty of the party in such case, to ask more specific and definite instructions.—Hutchinson v. Dearing..... 798

COMMISSIONERS' COURT.

1. When the proceedings of the Commissioners' Court in the establishment of a public road are removed by *certiorari* into the Circuit Court, and the order establishing the road is there quashed and the *supersedeas* perpetua-

ted, the judgment of the Circuit Court applies only to the proceedings then before it, and has no effect on an order subsequently made upon a new and distinct application.—Sabra Thompson v. The State..... 54

2. The Court of Commissioners of Road and Revenue in this State has no power to hold special terms, except in cases expressly authorized by law; and all orders made at such unauthorized terms are *coram non judice*, and void.—Wightman v. Karsner..... 446

3. The orders of a court acting without authority are nullities, and may be inquired into, and impeached, in all other courts, before which such orders are brought and relied upon by a party claiming a right or benefit under them..... 446

4. A claim against a county, audited and allowed at an unauthorized term of the Commissioners' Court, creates no liability on the county, and the county treasurer may rightfully refuse to pay it..... 446

CONSTABLE.

1. A constable may levy an attachment issued by, and returnable before a justice of the peace.—Langdon et al. v. Raiford..... 532

CONSTITUTIONAL LAW,

1. Exclusive jurisdiction over the importation of slaves is vested in Congress after the first day of January, 1808, by the ninth section of the first article of the Constitution of the United States.—The State ex rel., Savary v. Caroline et al..... 19

2. The State courts could at no time exercise any jurisdiction in cases of violation of the laws prohibiting the slave trade, except such as were authorized by the Congress of the United States; and all jurisdiction is now taken away from them, by the fourth section of the act of Congress, approved March 3, 1819..... 19

CONTRACT AND AGREEMENT.

1. Defendant having goods at A, contracted with plaintiff for the hauling of them to his house in Randolph county. Plaintiff agreed to start for the goods, with his wagons, on Sunday, but did not start until the following Tuesday. On arriving at A, he was informed, by the receiving and forwarding agent, that defendant's goods had been sent off ten days previously, and that he then had no goods at that place. Plaintiff brought assumpsit on the contract, and *it was held:*

   1. That the agent's statement, as to defendant's goods having been sent off ten days previously, was inadmissible, since it related to a past fact having no connection with the *res gestae.*

   2. That his statement that defendant then had no goods at A, was admissible, as showing an excuse for not complying with the order of his principal,

   3. That plaintiff was not justified in failing to start on the stipulated day, by the previous removal or shipment of the goods of which he had no notice; and that a charge which asserted the contrary was erroneous.—Lundie v. Cosper..... 123

2. A promise in writing to pay the debt of another, in consideration of forbearance to sue, is founded on sufficient consideration and is valid in law.—Martin v. Black's Ex'rs..... 309

3. But if the creditor has not the legal right to sue at any time during which he promises to forbear suit, the promise to pay in consideration of such forbearance is without consideration, and consequently void..... 309
4. Letters of administration on the estate of a deceased debtor having been granted *on the 1st October*, 1847, the defendant, who was his mother, promised the creditor, that if he would not proceed to subject the property of the estate to payment of his debt "until the crop of cotton made in the year 1847 on the plantation of the deceased was sold, *which probably would be during the ensuing Spring*," she would pay the debt. The creditor forbore to institute suit against the estate, and afterwards brought assumpsit against the defendant, on her written promise, *Held*,
That the promise was founded on sufficient consideration..... 309
5. A promise to pay the debt of another, which is not reduced to writing, and is not beneficial to the promisor, is within the statute of frauds, and void..... 309
6. A promise to pay out of the assets of the estate of the deceased debtor will not bind the administrator personally..... 309
7. A contract, by which a tresspasser agrees to sell the possession of land acquired by the trespass, cannot be sustained.—McCall's Adm'r. v. Capehart & Harbin..... 521

COSTS.

1. When two persons sign their names to the blank form at the bottom of a writ acknowledging themselves security for the costs of suit, their contract is joint only, and not joint and several, either at common law or under the statute of this State.—Boswell v. Morton..... 235
2. But when suit is instituted against one of them on their joint contract, he can only take advantage of the non-joinder of the other by plea in abatement..... 235
3. And when a motion is made for a summary judgment against one for the costs of the suit, and he does not interpose any objection on account of the non-joinder of the other, as a defence, he will be held to have waived it.. 235
4. A motion for a summary judgment against a security for the costs of suit may be made before the costs are taxed; and it is sufficiently certain by showing that it is for cost, without setting out the amount or items of cost..... 235
5. When a nonsuit is taken which is afterwards, on a subsequent day of the term, set aside "on the payment of all the costs of suit," and the costs are not paid until after the adjournment of court, the cause cannot be stricken from the docket on motion.—Parker v. Doe ex dem. Burgen & Pearsall..... 251
6. When a new trial is granted to the defendant "on the payment of all the costs of suit," the order is not an *absolute*, but a *conditional* grant of a new trial, and its effect is to keep the cause in court *sub judice* until the next term,—Ex parte Lowe..... 330
7. And if the costs are paid during vacation, or before the cause is called up for action by the court at the next succeeding term, the condition is complied with, and the effect of such a payment is to place the cause on the docket for trial..... 330
8. A non-resident, who voluntarily appears in the Court of Probate and contests the validity of a will, may be required to give security for the costs if unsuccessful.—Rainer v. McElroy..... 347

9. The Judge of Probate is not entitled to any fee for "certificates of filing bond for costs," nor for "filing depositions, and certificates of filing the same." 347
10. A sheriff is not entitled to any fee for "entering and returning notices," nor for "entering subpœnas." 347
11. The plaintiff in error will not be decreed full costs in the Appellate Court, when the error, for which the decree of the court below is reversed, might have been remedied if the objection had been raised in the primary court.—Frowner et al. v. Johnson et al. 477

CRIMINAL LAW.

1. The eighteenth section of the fourth chapter of the Penal Code (Clay's Digest, 419, § 18) has not an extra-territorial operation.—Spencer v. The State 24
2. The terms "steal" and "larceny," as used in the twenty-fifth section of the fourth chapter of the Penal Code, (Clay's Digest, 420, §25,) are technical, and do not include an offence which would not amount to a larceny if committed in this State 24
3. The offence of gaming is complete by playing once.—Swallow v. The State 30
4. An unoccupied store house, situated in a town, and fronting on the street, if habitually resorted to by persons for the purpose of playing cards, comes within the provision of the statute against playing cards at any "out house where people resort." 30
5. A charge to the jury in a criminal case "that if any one or more of their number differed from the majority of the panel as to the guilt or innocence of the defendant, they might properly waive their convictions and agree with the majority, but were not bound to do so," is calculated to mislead the jury, and is therefore erroneous 30
6. When a husband is indicted for an assault and battery on his wife, he may show, in mitigation of the fine, that *at the time* of the assault he was imdiately provoked to its commission by her bad behaviour and misconduct.—Robbins v. The State 36
7. In a criminal prosecution it is error for the court to charge the jury, that if the proof left the question of the guilt or innocence of the accused in equipoise, they could not on that account alone acquit.—Winter and Scisson v. The State 39
8. To warrant a conviction on an indictment for feloniously aiding slaves to escape from the service of their master, the State must prove that the defendant *aided* the slaves to escape, and that *they were the slaves* of the person whose property they are averred to be in the indictment 39
9. Indictment for playing cards "at a *public place*." The proof showed that there was a large assembly of persons on a public day at a certain store house in the country. The defendants, five in number, "went into a piece of woods where the under growth was very thick, and into a deep hollow in said woods about four hundred yards from said store, and out of sight of any road," and there engaged in a game of cards. Whilst so engaged, three other persons came to the same place, and took part in the game, one of whom testified, that when he went into the woods he did not know where the defendants were, but hunted them up; that he had never known cards to be played at that place before, but that during the previous year he had known persons to play "in the piece of woods," some fifty or one hundred yards from "said hollow." *It was held.*

That the playing was not "*at a public place.*"—Bythwood, et al. v. The State..... 47

10. The assemblage of eight or ten persons by invitation at a private house or room, to which the public have not the right to go, for the purpose of playing cards, or participating in social amusements, does not constitute such house or room "a public place," within the statute against gaming.—Coleman et al. v. The State..... 51

11. If the occupants of a room are in the constant habit of inviting a number of persons to their room for the purpose of playing cards, and others are allowed to come uninvited without any restraint, it is testimony tending to prove the room "a public place," and the jury may so find it..... 51

12. A bailee could not be guilty of larceny at common law by a fraudulent conversion of the deposit.—Wright v. Lindsay..... 428

See Indictment.

DAMAGES.

1. The measure of damages for the false warranty of the soundness of a slave, when the purchaser has not offered to return him, is the difference between his actual value and the amount which he would have been worth if sound.—Worthy, Brown & Co. v. Patterson..... 172

2. In an action to recover damages for injuries done to plaintiff's hogs, which had broken into defendant's enclosure, the defendant cannot *recoup* for damages done to his crop by the hogs, when it is shown that his fence was not a "lawful fence" agreeably to the statute.—Woodward v. Purdy.... 379

3. A voluntary purchaser from an executor *de son tort*, when sued in trover by the rightful administrator, cannot show, in mitigation of damages, that since the purchase, the executor *de son tort* has paid debts which the administrator was bound to pay in due course of administration.—Carpenter v. Going, Ad'mr..... 587

4. Whether under our statutes, the executor *de son tort*, when sued in trover by the rightful administrator, can show such payments in mitigation of damages, *Quere?*—..... 587

5. In trover, the measure of the damages is the value of the goods at the time of the conversion, or at any time subsequent thereto and before the trial, with interest on such value.—Ewing v. Blount..... 694

6. But this rule only applies when the property has not been regained by the owner. If the plaintiff has regained the possession, he is only entitled to recover damages equal in value to the use or service of the goods, and also compensation for any injury done to them; and if he is put to necessary and reasonable expense in regaining the possession (otherwise than by suit at law), he may recover such expenses from the wrong-doer.

[Ligon, J., *dissenting*, held, that if the plaintiff regains the possession pending the suit, and its value when so regained equals its value at the time of conversion, or at any time between its conversion and return, then the defendant is entitled to an abatement of the damages to the extent of this value, and that judgment should only go for the interest.]..... 694

See, Action on the Case, 5.

DEBTOR AND CREDITOR.

1. A debtor has an interest, and consequently a right, to know who is the true owner of a judgment against him, and in the absence of all evidence, save such as the record furnishes, he must look upon the person for whose

use the judgment is recovered, as the true owner, and if he be a fictitious person, then the debtor may treat the nominal plaintiff as the real owner, and proceed to settle the demand with him.—McGehee v. Gindrat..... 95

2. Whatever is sufficient to put a party upon inquiry, is sufficient to charge him with notice; and a want of notice of a fact, resulting from a failure to use proper diligence to ascertain it, furnishes no protection to a party.. 95

3. A debtor, against whom a judgment had been recovered, in the name of the nominal creditor, for the use of a fictitious person, applied to the attorney of record, who was also the attorney of the real owner of the judgment, to know who was the true owner, that he might settle the judgment with him. The attorney, acting under the instructions of the real owner, refused to disclose his name, but informed the debtor that the nominal plaintiff had no right to settle the judgment, and that it had been transferred to one of his creditors. The debtor afterwards settled the judgment with the nominal plaintiff, and the sheriff returned the execution satisfied. On motion by the plaintiff, to have the execution satisfied, *it was held*,

That the defendant could not be charged with implied notice, from the vague information communicated by the attorney, on the ground that it was sufficient to put him upon inquiry, since the inquiry, *as to the real owner*, had been made, and had proved futile..... 95

4. The fact that a creditor was unable to collect his debt is evidence tending to show the insolvency of the debtor, and is admissible for that purpose; but it may be explained by showing that the inability to collect did not result from the debtor's inability to pay.—Bilberry, Adm'r. v. Mobley 260

5. The debtor has the right to direct the application of a payment made to his creditor; and if he fails to give such direction, then the creditor may apply it; but if only one demand is proved to exist, and a payment is made without any direction, the law applies it to the payment of that demand.—McDonnell v Bank of Montgomery..... 313

6. A creditor's bill, filed by the beneficiaries, for the settlement of a deed of trust executed by the debtor, which required that the secured creditors should assent to its provisions within six months, must allege that the complainants assented to the deed.—Colgin et al. v. Redman et al..... 650

7. An allegation that the complainants "have consented to the provisions of said deed," is sufficient, although the deed requires that they should assent to it "*within six months*"..... 650

8. The rule which requires a dismissal of the whole bill, if any one or more of several co-complainants fail to make out their case, has never been applied with any stringency to creditor's bills; and unless a misjoinder of such complainants will affect the propriety of the decree, the objection will not be allowed to prevail in any case, when taken for the first time at the hearing..... 650

9. Even if the objection for misjoinder of complaints were allowable in cases of creditors' bills, it should be interposed by way of demurrer; and the cases are exceedingly rare, if they exist at all, in which demurrers to creditors' bills, for misjoinder of complainants, will be sustained..... 650

10. A deed of trust contained the following provisions, viz.: "They (the trustees) shall pay and satisfy the following debts of the party of the first part, *in the following order*, to wit: first class," &c. (naming them.) "The above demands compose the first class of preferred creditors, being principally endorsers, securities, and those who advanced money to the said

party of the first part, and all are to be satisfied and discharged in full. The second class comprises the following claims," &c. (naming them), "which shall be paid ratably and proportionably, after the entire discharge of the debts in the first class enumerated" *Held*,
That the word "order" referred to the division of the debts into *classes*, and not to the *relative position* of the debts specified in the first class; and that the funds, being insufficient to satisfy all the debts of the first class, must be divided ratably among those who assented to the deed within the time specified..... 650

11. The general rule is, that to entitle a creditor to the assistance of chancery upon an allegation of fraud in his debtor, he must stand as a creditor with a lien, or as one who has exhausted his legal remedies.—Pharis et al. v. Leachman, Adm'r. et al..... 662

12. But this rule does not apply to administrations, in relation to which Courts of Chancery have jurisdiction over estates, in the direction and control of executors and administrators, and in protecting the rights of creditors generally, as well as in decreeing distribution of assets, by virtue of their original powers..... 662

13. Where a debtor sells to his judgment creditor, at a stipulated price, certain slaves to which he has no title, with the understanding and agreement that the price is to be credited on the judgment, unless the title should prove bad and the slaves be lost to the creditor, in which event only the hire for the time during which they remained in the creditor's possession was to be credited on the judgment, and the slaves were afterwards recovered from the creditor in an action of trover by the legal owner, together with damages from the time when he acquired them, the debtor is not entitled to credit for the hire..... 662

14. A creditor may come into a court of equity against the executor *de son tort* of his debtor, to obtain satisfaction of his debt out of property which the debtor fraudulently conveyed, and which is in the possession of a person who cannot administer it as the lawful representative, being bound by the fraud of the intestate; and in such case, it is not necessary that the creditor should have exhausted his legal remedies, or should stand as a creditor with a lien.—Watts et al. v. Gayle & Bower et al..... 817

DEEDS, THEIR PROBATE, REGISTRATION, &c.

1. It is not essential to the probate of a deed that it should be proved to have been executed on the day of its date. It is *prima facie* sufficient, if the date of the deed and the date of the certificate of probate show that the instrument was recorded within the time required by law.—Parsons v. Boyd..... 112

2. A recital in the certificate of probate that the grantor acknowledged the deed "to be his free act and deed," is tantamount to saying that he "signed, sealed and delivered" it..... 112

3. When the endorsements on a deed show at what time it was left with the clerk for registration, and the book and page in which it is recorded, and these endorsements appear to have been made by the clerk, there is a *substantial compliance* with the statute, (Clay's Digest, 155, § 23,) and the endorsements may be read in evidence..... 112

DEEDS AND COVENANTS.

1. In an action upon a covenant of seizin, the breach may be as general as

the covenant.—Anderson v. Knox..... 156
2. A covenant of seizin is broken as soon as made, if the covenantor had no title to the estate granted..... 156
3. An unqualified covenant against incumbrances is broken by the existence, at the time of its execution, of an outstanding incumbrance; but if the covenant merely extends to quiet enjoyment against incumbrances, then it is broken only by an entry, or expulsion from the premises, or some disturbance in the possession..... 156
4. In an action on a covenant of seizin, or against incumbrances, if the plaintiff has bought in an outstanding title or incumbrance, he is entitled to recover the reasonable price which he fairly and necessarily paid for it..... 156
5. But the amount paid by the plaintiff for such outstanding title or incumbrance is no evidence of its value, in the absence of all other evidence..... 156
6. The fact that the plaintiff offered to prove the reasonableness and fairness of the price paid by him for the outstanding incumbrance, and was prevented by an objection on the part of the defendant, which was sustained by the court, does not justify the jury in acting without proof, or considering that as proof which would otherwise be incompetent..... 156
7. When several are bound by an executory contract to make titles to a vendee, all must join in the conveyance in order to a complete performance of the contract.—Johnson & Wife v. Collins..... 435
8. But when two or more are bound for the performance of one duty, and the obligee accepts from one of them something in satisfaction of the duty, and in lieu of a strict performance, this shall discharge all; for the obligation, being satisfied and discharged as to one, is necessarily satisfied and discharged as to all..... 435
9. When a bond for titles is executed by two, and the obligee afterwards accepts from one of them a deed executed by himself and a third person, it is a question for the jury to determine whether the deed was accepted in satisfaction of the bond..... 435
10. When an obligation is not completely performed, and the obligors insist upon satisfaction in lieu of performance. the burthen of proof is upon them to show that the thing done or given in lieu of performance *was accepted by the obligee, and intended as a satisfaction*..... 435
11. When two execute a bond for titles, and the obligee afterwards accepts a deed executed by one of them and a third person, and subsequently releases the obligor who executed the deed from all the covenants therein contained. the release does not affect the liability of the obligors on their bond..... 435
12. In debt on bond executed by two, defendant pleaded satisfaction, and proved that a deed executed by one of the obligors and a third person had been delivered to, and accepted by the obligee. The court charged the jury, that if they believed that the deed was accepted by the obligee, in full discharge and satisfaction of the bond, then the bond was extinguished; that whether it was so accepted or not, must be determined by the testimony of the case relating to that matter: and that if the bond was not surrendered or cancelled at the time the deed was delivered, and there was no agreement or understanding between the parties that it was to be surrendered or cancelled, then the presumption was that the deed was not taken in full discharge and satisfaction. *Held*,

1. That the charge was not erroneous.
2. That a charge was properly refused, which withdrew from the jury the *intention of the parties* in making and accepting the deed relied on as a satisfaction of the bond..... 435

DEPOSITIONS.

1. A deposition will not be suppressed because the christian name of the witness is not stated in the affidavit made to procure the issuance of the commission, when the commission and notice so describe and identify the witness as to preclude the idea that the opposite party could have been misled or injured by the omission.—Parsons v. Boyd..... 112
2. When a deposition appears on its face to have been regularly taken, and there is nothing in the commission or notice to show that it was illegally or irregularly taken, a motion to suppress it, on the ground that the notice of the time and place of executing the commission was insufficient, is addressed to the sound discretion of the primary court, and its action cannot be reviewed on writ of error..... 112
3. Proof that a witness, who had been subpœnaed, and whose deposition had been taken twelve days before the trial, was infirm and generally unable to leave home about the time when his deposition was taken, raises a *prima facie* presumption that he was unable to attend court, and, in the absence of proof to the contrary, showing his ability to attend, warrants the admission of his deposition.—Worthy, Brown & Co. v. Patterson..... 172
4. As a general rule, if a party is present at the taking of a deposition, and allows secondary evidence to be received, without objection, he will not be allowed to raise the objection afterwards.—Boykin, McRae & Foster v. Collins..... 230
5. An objection to a deposition, on account of the incompetency of the commissioner to act as such, cannot be taken for the first time at the hearing. The objection should be taken and reserved at the time of filing the cross-interrogatories.—Colgin, et al. v. Redman et al..... 650
6. Mere identity of name, of itself, is not sufficient to establish the fact, that the commissioner, before whom a deposition is taken, is the same person who is shown by the papers of the cause to be an interested party, and therefore incompetent to act as commissioner; nor will the deposition be suppressed, on account of the bare identity of name..... 650

DETINUE.

1. To maintain detinue, the plaintiff must show that he has the exclusive legal title to the chattel sued for.—Parsons v. Boyd..... 112
2. The statute of this State which abolishes the right of survivorship between joint tenants, (Clay's Digest 169,) applies only to those who hold the absolute property in their own right, and not to those who hold as trustees merely, or in *autre droit*..... 112
3. If a power coupled with a trust be given to two or more, it may be executed by the survivor of them..... 112
4. When personal property is conveyed by deed of trust to two trustees, with power to sell and pay the debts intended to be secured, the survivor of the trustees has the entire legal title to the property, and may maintain detinue for its recovery..... 112
5. In detinue by husband and wife jointly, when the record shows such title in the wife as would vest a chose in action absolutely in the husband, and is

silent as to the time of the wrongful taking and detainer by the defendant, the Appellate Court will presume in favor of the correctness of the judgment of the court below, that the proof showed such unlawful taking and detainer to have been before the marriage.—Mitchell v. Cowsert and Wife. 186

6. To entitle the plaintiffs to recover in action of detinue, they must show that the defendant, either at the time of the demand made, or, if no demand was made, at the time the writ was sued out, had the actual possession, or the controlling power over the property; unless, having the possession anterior to such demand or suit, he has wrongfully, or to elude the plaintiff's action, parted with it, or unless he holds it under a contract of bailment, the terms of which he violates by failing to re-deliver it.—Walker v. Fenner et al. 192

7. If a party who has the possession of personal property *pur autre vie*, hires it out for the usual period of hiring such property, and the life estate determines pending the term, he is guilty of no wrong to the remainder-men who may in such case bring detinue against the person in actual possession, or wait until the hiring expires, and the property is returned to the former possessor. 192

8. In detinue, the defendant cannot show that the plaintiff's possession of the property sued for was acquired by fraud, without connecting such fraud with his own title.—McGuire v. Shelby. 456

9. B. & Co. received a lot of cotton, as commission merchants, which they stored with defendants, who were ware-house men; afterwards, having obtained an advance of money for their individual use from plaintiffs, they pledged the cotton as security for its payment, and gave plaintiffs an order on defendants for its delivery; defendants acknowledged plaintiffs' title, and agreed to hold the cotton for them, and plaintiffs agreed to pay the storage on it; B. & Co. afterwards sold the cotton to T. & S., and gave them an order on defendants for its delivery; defendants delivered the cotton to them, and received it again from them, on the same day, for storage; B. & Co. paid a part of the money, which they received from T. & S. on the sale of the cotton, to plaintiffs, on an account due them previous to the pledge of the cotton; plaintiffs received the money in ignorance of the source from which it was derived, and credited it on B. & Co.'s prior indebtedness to them. Plaintiffs brought detinue against defendants for the cotton; and *it was held*,

   1. That plaintiffs' title was superior to that of T. & S.;
   2. That the receipt of the money by plaintiffs was not a confirmation of the subsequent sale of B. & Co. to T. & S., and did not entitle defendants to a credit on the amount of the recovery against them.—Bott v. McCoy & Johnson. 579

DEVISE, LEGACY AND BEQUEST.

1. A child born of a female slave, after the making of the testator's will, but before his death, does not pass under the will to the legatee to whom its mother is bequeathed, but goes to the executor as property unbequeathed. —Hardy v. Toney. 237

2. A condition annexed to the vesting of a legacy requiring the guardian's approbation of the legatee's marriage, is not *in terrorem* only, when the condition is confined to marriage under twenty-one, and there is a limitation over.—Collier, Exr. v. Slaughter's Admr. 263

3. When a legacy is given, to vest upon the legatee's arriving at the age of twenty-one. or marrying before that time with the approbation of her guardian, and the legatee marries under twenty-one with the consent of her grandfather, with whom she is living at the time, this is not a compliance with the condition, although at the time her father and mother are dead, and she has no legally constituted guardian..... 263

4. A testator by will directed that his estate should be kept together until his daughter married or attained the age of twenty-one, and that in the meantime she, and his three step-children, Ellen, John and Lawrence, should be supported and educated out of the proceeds. Another clause was in the following words: "When my daughter becomes of age, or is married, she is to have my farm," &c., (describing it,) "and one half of my personal estate, money on hand, and claims of every kind due or to become due for money or personal estate; the other half of my personal estate, as just above stated, I wish and direct to be equally divided amongst my three step-children above named, as they respectively become of age, or Ellen may marry with the approbation of her guardian. But in the event that any or all of my step-children shall die before they arrive of age, or Ellen may marry as aforesaid, then the amount herein devised to them or either of them, as may happen, is to be divided as follows," &c. *It was held,*

That the legacies to the step-children did not vest in them absolutely upon the testator's death, but were contingent until the legatees respectively arrived at the age of twenty-one, or Ellen married with the approbation of her guardian; and that, Ellen having married under the age of twenty-one without the approbation of her guardian, the share of one of the step-children who afterwards died, before reaching the age of twenty-one, did not pass to his personal representative..... 263

5. A legatee may come into a court of equity to enforce payment of his legacy from a refractory executor.—Huckabee v. Swoope..... 491

6. When the enjoyment of a legacy is made to depend upon a condition subsequent, and the performance of that condition depends alone upon the legatee, who has the power to do what is required, and he fails to perform it, such failure will work a forfeiture of the legacy..... 491

7. But where, upon the marriage of the testator's widow, her husband takes control of the family, locks the house against his wife's sister, and refuses her admission, she cannot be held to have *voluntarily abandoned* the testator's family, or to have forfeited a legacy, which was made to depend upon her remaining single, and living in the testator's family..... 491

8. A legatee cannot proceed in the Court of Probate against an executor to recover a legacy, before the expiration of eighteen months from the granting of letters testamentary.—Horton, Ex'r. v. Averett..... 719

9. A judgment rendered by the Court of Probate against an executor in favor of the legatee, before a final settlement of the estate by the executor, is erroneous 719

DOWER.

1. An outstanding title to dower is such an incumbrance on land as will authorize a purchaser, who has contracted for a good and lawful title, to refuse to perform an executory contract for its purchase.—McLemore v. Mabson et al..... 137

2. The widow is entitled to the dwelling house in which her husband resided at the time of his death, free of rent, until her dower is assigned. (Clay's Digest, 183, § 7.)—Pharis et al. v. Leachman, Adm'r..... 662

EJECTMENT.

1. A title to land situated within the Territory of Louisiana, which was confirmed under the third section of the act of Congress of May 8, 1822, derives its validity and vitality from the act itself, and not from the subsequent location and survey, which the Register and Receiver was authorized to make under the fifth section of the act.—Chastang's Heirs v. Armstrong 609
2. Such a title is a legal title, and is sufficient to maintain an action of ejectment..... 609
3. The act of Congress vests the title in those who are alleged to be the claimants in the application to the Commissioner, and according to their interest as therein proponnded..... 609
4. Where a claimant, as executor of his father's will, made application to the Commissioner, "on behalf of himself and the other legatees," therein named, praying that he might be confirmed in his claim, and the Commissioner having reported favorably to the claim, the same was afterwards confirmed by the act of Congress, the title vests in all the devisees of the testator, and they may maintain ejectment..... 609
5. Where two different claims to the same tract of land are confirmed by the same act of Congress, the title of the Government can pass but to one of the confirmees; and if it be admitted that one has a perfect title, it follows that the other can have none at all..... 609

ERROR.

1. In a criminal prosecution it is error for the court to charge the jury, that if the proof left the question of the guilt or innocence of the accused in equipoise, they could not, on that account alone, acquit.—Winter & Scisson v. The State..... 39
2. When evidence *prima facie* irrelevant is admitted against the objection of the opposite party, and the record affirmatively shows that its relevancy was made to appear from its connection with evidence subsequently introduced, the Appellate Court will not reverse.—Lawson & Swinney v. The State..... 65
3. The action of the Court of Probate on a writ of *habeas corpus*, cannot be reviewed in the Appellate Court on a writ of error.—Wilkinson v. Murphy..... 104
4. The admission of improper evidence against a party furnishes no ground of reversal, when no injury can by possibility result from its admission.—Parsons v. Boyd..... 112
5. Matters cannot be assigned for error in the Appellate Court which were not excepted to, nor in any other manner reserved, by the plaintiff in error, in the court below.—Gordon et al. v. McLeod, Ex'r..... 242
6. In assumpsit against husband and wife, on a note executed by the wife *dum sola*, two writs having been issued, but only one served on each defendant in different counties, it is not error to refuse a motion to quash the writs, on the ground that there was no endorsement showing that they were for one and the same cause of action. Such objections must be

pleaded in abatement, if the defendant wishes to avail himself of his right to review the decision of the court below.—Johnson and Wife v. King..... 270

7. Where a sheriff, having sold property under sundry executions, applies to the court out of which they issued, for directions how to appropriate the money, and several of the plaintiffs in execution except to the ruling of the court on such application, but one writ of error is allowable, to which all must be made parties —Br. Bank Decatur v. McCollum..... 280

8. A writ of error does not lie to reverse a decree of insolvency until a final decree of settlement has been rendered, unless an issue has been made up and tried under the act of 1843.—Black's Creditors v. Black's Adm'rs.... 401

9. If an issue is made up and tried, under the act of 1843, a writ of error can only be sued out within a year from the trial of such issue..... 401

10. In an action of debt upon a judgment rendered in Mississippi, it is error to render judgment final by *nil dicit*, without the intervention of a jury, for the amount of a debt and eight per cent. interest thereon as damages.—Clarke v. Pratt..... 470

11. A decree of distribution having been made to the children of a deceased distributee, the assignment that there is error in the decree of distribution presents the question whether the sums decreed were distributed to the proper parties.—Frowner et al. v. Johnson et al..... 477

ESTATES OF DECEASED PERSONS.

1. The Court of Probate has not jurisdiction to compel an administrator to convey his intestate's interest in certain lands, which were sold by a firm in which the intestate was a partner, unless the intestate had entered into "bond or obligation to make title thereto."—Wilkerson, Adm'r v. Vinson. 131

2. It is the duty of the Court of Probate to commit an estate to an administration, on the application of a creditor, or other person interested in it—Brennan's Adm'r v. Harris et al..... 185

3. But the refusal of the court to grant letters of administration to the sheriff, on the application of a party representing himself to be a creditor, is not an interlocutory or final order, within the meaning of the act of 1850, (Pamphlet Acts, 33 § 29,) from which an appeal lies..... 185

4. The party's remedy is by *mandamus*..... 185

See Insolvent Estates.

EVIDENCE.

1. A declaration, of a character proper for a slave to make, made by him in the presence and hearing of a white person from whom it naturally called for a response, is admissible evidence against such white person, if uncontradicted by him, as showing acquiescence in the truth of the statement.—Spencer v. The State..... 24

2. In all cases, whether civil or criminal, involving a charge of illicit intercourse within a limited period, evidence of acts anterior to that period may be adduced in connection with, and in explanation of, acts of a similar character occuring within that period, although such former acts would be inadmissible as independent testimony, and, if treated as an offence, would be barred by the statute of limitation.—Lawson & Swinney v. The State..... 65

3. Acts of indecent familiarity within the limited period cannot be explained by proof of the subsequent illicit intercourse of the parties; but when such acts of indecent familiarity have been explained by previous acts of

illicit intercourse, then proof of the subsequent illicit intercourse becomes corroborative or cumulative evidence, and is admissible..... 65
4. When a man and a woman are jointly indicted and tried for living together in fornication, the confessions of the woman are admissible evidence against herself..... 65
5. But it is the duty of the court to caution the jury that such confessions can operate only against the party making them, and that the other defendant cannot be convicted, except upon evidence *aliunde* sufficient to establish his guilt..... 65
6. The admission of the woman that her co-defendant was the father of a bastard child, of which she was delivered more than twelve months after the finding of the indictment, is admissible evidence against her, its relevancy being shown by connecting it with other acts occurring before and within the period covered by the indictment..... 65
7. When evidence *prima facie* irrelevant is admitted against the objection of the opposite party, and the record affirmatively shows that its relevancy was made to appear from its connection with evidence subsequently introduced, the Appellate Court will not reverse..... 65
8. The refusal of the male defendant to pay the physician for his professional services rendered during the confinement of the woman, and his declaration that the child was not his, are not admissible evidence for him, when unconnected with any conversation or admission offered by the State against him..... 65
9. The fact of illicit connection between a man and a woman is one which, from its nature, can very rarely be directly proved, and must, in the great majority of cases, be inferred from circumstances, the weight and conclusiveness of which vary according to the situation and character of the parties, the habits of society, and other incidental circumstances..... 65
10. A statement made by another person, or a conversation carried on in the presence and hearing of a party, to which he made no reply, cannot be received in evidence against him as an implied admission on his part of its truth, unless it was of such a character as would naturally call for a response from him, and he was in a situation in which he would probably have replied to it..... 65
11. A conversation carried on in the presence of the woman, and in the room where she was lying, a few minutes after she had been delivered of a child, between her mother and the attending physician, as to the person to whom the latter should look for payment of his professional services, in which conversation she took no part, is not admissible evidence against her, as tending to show her acquiescence in the truth of their statements..... 65
12. The admission of improper evidence against a party furnishes no ground of reversal, when no injury can by possibility result from its admission.—Parsons v. Boyd..... 112
13. An attorney will be presumed to have read a declaration to which pleas are filed in the name of a firm of which he is a partner; and the record of the suit in which such proceedings were had, is admissible evidence in a subsequent suit against the attorney, to prove actual notice to him of the plaintiff's title, as set out in said declaration..... 112
14. Defendant having goods at A., contracted with plaintiff for the hauling of them to his house in Randolph county. Plaintiff agreed to start for the goods, with his wagons, on Sunday, but did not start until the following

Tuesday. On arriving at A., he was informed, by the receiving and forwarding agent, that defendant's goods had been sent off ten days previously, and that he then had no goods at that place. Plaintiff brought assumpsit on the contract, and *it was held:*

1. That the agent's statement, as to defendant's goods having been sent off ten days previously, was inadmissible, since it related to a past fact having no connection with the *res gestæ.*
2. That his statement that defendant then had no goods at A., was admissible, as showing an excuse for not complying with the order of his principal.
3. That plaintiff was not justified in failing to start on the stipulated day, by the previous removal or shipment of the goods of which he had no notice; and that a charge which asserted the contrary was erroneous.—Lundie v. Cosper..... 123

15. Parol proof is admissible to show the intention of the parties to a note at the time the contract was entered into, with regard to their several liabilities among themselves, and the relations which they were to bear to the note.—Br. Bank, Mobile v. Coleman..... 140

16. In assumpsit by plaintiff against his commission merchants, to recover damages for losses on cotton, plaintiff introduced proof of a conversation between himself and defendants, for the purpose of showing that he had instructed them to sell his cotton and not to hold it. *Held,*

That the fact of instructions must be determined from the whole conversation, as brought out on direct examination and cross-examination; and that the court properly refused to instruct the jury upon the effect of a particular portion of it only.—Ward v. Winston & Co..... 167

17. In applications for divorce, when the answer admits the marriage, proof that the parties had lived together as man and wife for more than forty years, is sufficient evidence of the marriage.—Morris v. Morris..... 168

18. In assumpsit, for goods, wares, and merchandize sold and delivered, parol evidence is inadmissible, to prove that the goods were shipped and forwarded to the defendant, by her *written instructions*, unless the writing itself is produced, or its absence satisfactorily accounted for.—Boykin, McRae & Foster v. Collins..... 230

19. The objection to its admissibility may be raised for the first time, when the evidence is offered on the trial, although the deposition of the witness, taken upon interrogatories and cross-interrogatories, was in the possession of the defendant's counsel, for twenty-four hours before the trial, and no notice was given to the plaintiffs, to produce the writing..... 230

20. As a general rule, if a party is present at the taking of a deposition, and allows secondary evidence to be received without objection, he will not be allowed to raise the objection afterwards..... 230

21. In a suit against an administrator *de bonis non*, on a note purporting to have been executed by his intestate, an admission made by the administrator in chief of the genuineness of the signature, is not admissible against the defendant.—Rogers, Adm'r. v. Grannis & Co..... 247

22. Nor is the implied admission, arising from judgments recovered against the administrator in chief on notes signed in a similar manner, admissible evidence against the administrator *de bonis non*..... 247

23. A sale for taxes due the city, made by the corporate authorities of the city of Montgomery, under the power conferred upon them by the act of

incorporation, (see City Laws, 30,) has the force and effect of a sale under judgment and execution from the Circuit Court; a party, therefore claiming under such a sale must show that the requisitions of the statutes, as to the assessment of taxes and the subsequent proceedings relative thereto, were complied with.—Parker v. Doe ex dem. Burgen & Pearsall..... 251

24. Parol evidence cannot be received to show that a meeting of the Mayor and Aldermen, or board of assessors, was held, as required by the statute, (City Laws, 30,) for the purpose of correcting and sanctioning the assessment..... 251

25. When the record of the proceedings of the corporate authorities does not show that such a meeting was held, the mere advertisement of the Mayor calling the meeting does not warrant the presumption that it was held... 251

26. Nor can the fact that the meeting was held be inferred from the fact that a sale of certain taxable property, assessed to persons unknown, was ordered by the City Council..... 251

27. The fact that a creditor was unable to collect his debt is evidence tending to show the insolvency of the debtor, and is admissible for that purpose; but it may be explained by showing that the inability to collect did not result from the debtor's inability to pay.—Bilberry v. Mobley..... 260

28. The declarations of one in possession of personal property, as to the ownership, are not evidence of the condition of the same property more than three years before the declarations were made..... 260

29. Secondary evidence of the contents of an execution is admissible, upon proof that it has been returned to the clerk's office, and that diligent search has there been made for it, both by the clerk and the party's attorney. The presumption of its loss being once established will continue, until there is some evidence that it had been found since the search.—Poe v. Dorrah..... 288

30. When the admissibility of evidence depends upon the existence of a preliminary fact, it is the duty of the presiding judge to decide the question of its existence, though he may, if he chooses, take the opinion of the jury upon it.—Scott v. Coxe's Adm'rs..... 294

31. The fact that the plaintiff was frequently seen to purchase groceries from the defendant, who was the only grocer in the village, does not warrant the presumption that he purchased his entire supply from him, so as to authorize proof of the amount of groceries necessary for his family, or actually consumed by them, during the time such purchases were being made..... 294

32. The fact that a merchant, or grocer, employs no clerk, furnishes no reason for dispensing with the ordinary rules of evidence in proving his accounts..... 294

33. Proof of declarations, verbal or written, made by a witness out of court, is, as a general rule, inadmissible *in corroboration* of testimony given by him on the trial of a cause.—Nichols v. Stewart..... 358

34. The return of a sheriff on a *capias* is the highest and best evidence of its execution, and cannot be called in question collaterally, nor be impeached or varied by parol proof. Nor will the sheriff be allowed to depose to a state of facts inconsistent with his return.—Martin v. Barney..... 369

35. In a suit by the Bank against the maker on a promissory note purporting on its face to have been given for the amount of the maker's indebtedness to the Bank, evidence is admissible to show that the agreement which con-

stituted the consideration of the note was the extinguishment of the debt of another person to the Bank, and that the proceeds were so applied.—Murrah v. Br. Bk. Decatur..... 392

36. When evidence is objected to as a whole, the court is not bound to exclude any part of it unless the whole of it is inadmissible..... 392

37. In assumpsit to recover from defendant for the board of an orphan minor, who had no guardian, the plaintiff showed such a state of facts as tended to prove that defendant had placed himself *in loco parentis* to her. *Held*, That to rebut this presumption, and to show the manner in which he had received the child into his house, and his motive in receiving her, and afterwards carrying her to plaintiff's, the defendant might prove declarations made by the child at the time she came to his house.—Edy v. McCoy..... 403

38. When it becomes a material question, whether more personal injury was inflicted by the defendant on the plaintiff, than was necessary to protect the possession of the former against the attempt of the latter to enter his close, it is competent for the defendant to give in evidence conversations of the plaintiff held some time previous to the beating, though not communicated to the defendant until afterwards, showing an angry state of feeling between the parties, concerning their respective claims to the possession of the close.—Riddle v. Brown et al..... 412

39. Secondary evidence will not be received in lieu of primary, unless the original or primary evidence cannot be produced; and when all the evidence is of a primary character, it must go to the jury, and cannnot be excluded because more conclusive proof might have been offered.—Patton & Burgen v. Rambo..... 485

40. In assumpsit by the owner of a slave to recover money which his slave had paid to the defendant on being detected in stealing goods from his store; the slave's confession, made at the time of the payment, that he had stolen other goods from the defendant equal in value to the money paid, is admissible evidence for the defendant, as a part of the *res gestae*, to show the character of the payment and the circumstances under which it was made.—Jones v. Nirdlinger..... 488

41. On a trial of the right of property in slaves between the plaintiff in execution and the minor children of the defendant, the claimants cannot prove that it was a matter of public notoriety in the neighborhood, that defendant disclaimed all interest in, and ownership over, the slaves.—McCoy v. Odom..... 502

42. In an action on a promissory note which purports on its face to have been given "for the rent of land," the defendant cannot introduce parol proof to show that the payee also agreed to repair the fencing around the land, and that he failed to do so, in consequence of which failure defendant's crop was damaged by the breaking in of stock.—Evans v. Bell..... 509

43. A witness may testify to the value of certain goods conveyed by deed of assignment, although he had made out a written invoice, or schedule of the goods six or seven weeks previous to the assignment.—O'Neal v. Brown.. 510

44. The schedule, if produced, would not be evidence of the value of the goods at the time of the assignment..... 510

45. Declarations inseparably connected with material acts, which they serve to elucidate and explain, are admissible evidence as part of the *res gestae*. —Hooper v. Edwards..... 528

46. But declarations made after suit brought, and not connected with any fact or act whatever, are not admissible evidence for the party making them..... 528

47. Filiation may be established, at common law, by a satisfactory combination of facts indicating the connection of parent and child between an individual and the family to which he claims to belong; and the principal of these facts are, that he has always borne the name of the person whom he claims as his father; that the father has treated him as his child, and in that character has provided for his education, his maintenance, and his establishment; that he has been uniformly received as such in society; and that he has been acknowledged as such by the family.—Weatherford v. Weatherford..... 548

48. As a general rule, recitals in a deed are not evidence of consideration, in a controversy between those claiming under it and a pre-existing creditor of the grantor, in which it is impeached for fraud or want of consideration. —Pool v. Cummings & Co. et al..... 563

49. The books of a firm, to which all the partners have had free access, are evidence for and against each partner, in settling the partnership accounts; and the entries therein must be considered at least *prima facie* correct.—Desha & Sheppard v. Smith..... 747

50. When a paper is offered in evidence, and rejected by the primary court, as irrelevant, the Appellate Court will only examine the question of its relevancy.—Williams v. Fitzpatrick, Gov..... 791

51. Two suits were pending against a tax collector, for the county taxes of 1845 and 1846. On the trial of the suit for the taxes of 1845, he produced the receipt of the county treasurer for an amount greater than the sum due for the taxes of that year, but purporting on its face to be given for the taxes of 1845. He also examined the county treasurer as a witness, who testified that, though he would not deny his signature to the receipt, yet he was sure that defendant had never, at any one time, paid him so large an amount as that specified in the receipt; that if the receipt was his, it must have been given for some smaller receipts which defendant had never surrendered; that he was county treasurer for 1845-6-7, and had never had a final settlement with defendant. *Held*,

That upon this state of proof, defendant might introduce as evidence the said county treasurer's receipts for the year 1846, for the purpose of showing that all the receipts amounted in the aggregate to the taxes of the two years..... 791

52. A receipt given by the county treasurer while in office to the tax collector, for the county taxes, is admissible evidence in itself at all times for the latter, upon proof of the signature and that the maker was county treasurer at the time of its execution..... 791

EXCEPTIONS, BILL OF.

1. To authorize the Appellate Court to reverse a judgment on account of any supposed erroneous decision of the court below, in the rejection of evidence, it must be shown that the fact intended to be established by such evidence was material to the decision of the case then under consideration before the court; and the party excepting to such decision must, in his bill of exceptions, state sufficient to show the relevancy or materiality of the alleged erroneous decision to the case under consideration, at the time such decision was made.—Jones, Admr. v. Dyer and Wife..... 373

2. When the record contains a bill of exceptions signed and sealed in term time, and also other exceptions which are without date, with nothing on their face to show at what time they were taken, and entirely disconnected from the first bill of exceptions, but purporting to have been taken "during the further progress of the cause," the latter will be rejected as forming no part of the record.—Murrah v. Br. Bk. Decatur..... 392

EXECUTION, WRIT OF.

1. To support a writ of *fi. fa.* issued under the statute (Clay's Digest 305, § 45) against the securities of an executor, it is indispensable that a *fi. fa.* should have been issued against the executor, and returned "no property found;" otherwise the execution against the securities is void, and may be quashed on motion.—Poacher v. Weisinger et al..... 102
2. Defendant sold and delivered to plaintiff a slave, in consideration that plaintiff would pay all the debts then owing by defendant. Plaintiff afterwards commenced suit by attachment against C., to whom, at the time of the sale, defendant was indebted in the amount of a decree previously rendered against him in the Court of Probate in favor of C., and defendant was summoned as garnishee, and suffered judgment to be rendered against him, on which execution was afterwards issued. *It was held,*
That the execution could not be set aside, and satisfaction of the judgment be entered on proof of this agreement.—Matthews v. Robinson..... 130
3. Pending a trial of the right of property in slaves levied on under *fi. fa*, whether such trial be by action of detinue, or by claim suit under the act of 1812, the lien of the plaintiff in execution continues, and its operation only is suspended.—Br. Bk. Decatur v. McCollum..... 280
4. The return of a sheriff on a writ of *fi. fa.*, that "the property levied on was claimed by another, and not sold for want of indemnity," does not authorize the conclusion that he has parted with the possession of it; and unless he returns the property to the defendant in execution, or delivers it to the party claiming it, the lien of the execution continues..... 280
5. Where a sheriff, having sold property under sundry executions, applies to the court out of which they issued, for directions how to appropriate the money, and several of the plaintiffs in execution except to the ruling of the court on such application, but one writ of error is allowable, to which all must be made parties..... 280
6. When an execution against the unsuccessful party in the Appellate Court is returned "no property found," and execution thereupon issued against the successful party, for the costs occasioned by himself, as provided by the statute (Clay's Digest 310, § 25) and return "satisfied," an *alias* execution may be subsequently issued against the unsuccessful party.—Montgomery v. Montgomery..... 350
7. An execution, which is levied on a crop of cotton after it has been removed from the rented premises on which it was raised, and stored in a ware-house by the tenant, is entitled to preference over an attachment subsequently levied on it at the suit of the landlord for the rent of the premises, the former levy being made in ignorance of the landlord's lien, both on the part of the sheriff and the execution creditor.—Governor v. Davis.... 366
8. When an execution is levied upon the lands of the defendant, and before the sale another execution issued on an older judgment comes to the hands of the sheriff, the plaintiff in the senior judgment is entitled to the proceeds of sale.—Bagby, Gov., &c. v. Reeves et al..... 427

EXECUTORS AND ADMINISTRATORS.

1. To support a writ of *fi. fa.* issued under the statute (Clay's Digest 305, § 45) against the securities of an executor, it is indispensable that a *fi. fa.* should have been issued against the executor, and returned "no property found;" otherwise the execution against the securities is void, and may be quashed on motion.—Poacher v. Weisinger et al. 102
2. When a writ and declaration proceed against the defendant as administratrix, and all the counts are so drawn as to charge her in her representative character alone, proof of a demand against her individually will not support the declaration.—Anderson v. Rice, Admrx. 239
3. In a suit against an administrator *de bonis non*, on a note purporting to have been executed by his intestate, an admission made by the administrator in chief of the genuineness of the signature, is not admissible against the defendant.—Rogers, Admr. v. Grannis & Co. 247
4. Nor is the implied admission, arising from judgments recovered against the administrator in chief on notes signed in a similar manner, admissible evidence against the administrator *de bonis non* 247
5. A promise to pay out of the assets of the estate of the deceased debtor will not bind the administrator personally.—Martin v. Black's Exrs. 309
6. When the administrator in chief fraudulently, or without authority, makes a sale of personal property belonging to his intestate's estate, the parties in interest may treat it as an administration; and if they elect to do so, the administrator *de bonis non* cannot recover the property.—Elliott v. Br. Bk. Mobile 345
7. It is not ordinarily necessary that the record should show that the administrator made the affidavits required by law in regard to the use of the money of the estate and the names of the heirs and legatees. They will be presumed to have been made, in the absence of an exception for the want of them.—Clack's Heirs v. Clack's Admrs. 461
8. A voluntary sale, without any legal compulsion, by an executor *de son tort*, confers on his purchaser no better title than he himself had.—Carpenter v. Going, Admr. 587
9. A voluntary purchaser from an executor *de son tort*, when sued in trover by the rightful administrator, cannot show, in mitigation of damages, that since his purchase, the executor *de son tort* has paid debts which the administrator was bound to pay in due course of administration 587
10. Whether under our statutes, the executor *de son tort*, when sued in trover by the rightful administrator, can show such payments in mitigation of damages. *Quære?* 587

FORCIBLE ENTRY AND DETAINER.

1. Before the passage of the act of 1850, (pamphlet Acts 81,) in cases of forcible entry and detainer, unlawful detainer, &c., removed into the Circuit Court by *certiorari*, a trial must have been had on an assignment of errors on the record sent up by the justice of the peace, and not *de novo*; and if the party whose duty it was to assign errors, failed or refused to do so, the judgment of the justice must have been affirmed.—Mahan v. Lester 162
2. The act of 1850, which requires a trial *de novo* to be had in such cases, does not apply to cases which had been removed to the Circuit Court, and which were there pending at the passage of the act 162

3. Where the petition for a *certiorari* has been presented to the Circuit Judge, and his fiat obtained, and these had been filed with the clerk of the Circuit Court before the passage of the act. the jurisdiction of that court attached, and the act of 1850 cannot apply to the case, although the bond required by the judge was executed, and the writ of *certiorari* issued, after the passage of the act..... 162
4. When a trial *de novo* is improperly had in the Circuit Court, in a cause which was there pending before the passage of the act of 1850. the judgment founded upon the verdict of the jury will be reversed in the Appellate Court, although the plaintiff in error is the party who sued out the *certiorari*, and who failed to assign errors in the Circuit Court..... 162

FRAUDS, STATUTE OF.

1. A promise to pay the debt of another, which is not reduced to writing, and is not beneficial to the promisor, is within the statute of frauds, and void.—Martin v. Black's Ex'rs..... 309
2. Under the statute laws of North Carolina, a parol gift of slaves is null and void.—McCullough & Wife v. Walker & Wife..... 389
3. The "right to dig and carry away ore," from the mine of another, is an incorporeal hereditament, or easement; and any contract for the sale of such a right, to be binding in law, under the statute of frauds, must be in writing.—Riddle v. Brown et al..... 412
4. The retaining possession in this State of personal property for three years, under a loan made in another State, is within the second section of the statute of frauds, unless the loan is recorded pursuant to its provisions. (Clay's Dig. 254-5.)—McCoy v. Odom..... 502
5. The possession of the husband, under a loan to his wife and children, is the possession of the loanee within the second section of the same statute. 502
6. Where the donees of personal property are minor children, residing with their father, the possession of the property by the father will be referred to the title of the children, and is not within the second section of the statute of frauds, although it may have commenced under a loan to his wife and children, *and there was no actual change of possession*..... 502
7. Possession of personal property for three years under a loan, does not subject it to the debts of the party who has possession, unless his creditor, while it is thus held, acquires a lien on it by reducing his debt to judgment and taking out execution..... 502
8. The continuous possession for five years by the husband, of slaves placed in his possession by his father-in-law, is sufficient, unless rebutted by satisfactory proof, to raise the presumption of a gift.—Pharis et al. v. Leachman, Adm'r. et al..... 662
9. Although the borrower may have had the continuous possession of slaves for more than three years, without the registration required by the second section of the statute of frauds, yet if the owner resumes the possession of them before a creditor acquires a lien upon them, they cannot be subjected to the payment of the borrower's debts..... 662
10. Where a deed contains a general covenant of warranty, and there is, at the time of its execution, a paramount outstanding title, by which the vendee may be, or actually is afterwards evicted, he is a "creditor" of the covenantor, within the meaning of the statute of frauds, (Clay's Dig. 254, § 2,) from the execution of the deed.—Gannard et al. v. Eslava et al..... 732

11. In this State, a *voluntary* conveyance, though made *bona fide*, and in consideration of natural love and affection, is void as to the *existing creditors* of the grantor..... 732
12. Where a husband purchases and holds bank stock in his own name, as trustee for his wife, although the advancement will be held a valid gift as against his personal representative, yet the husband may revoke it at any time during his life, and a court of equity will subject it to the payment of his debts..... 732

FRAUDULENT CONVEYANCES.

1. A deed of trust executed by a defaulting guardian to indemnify and save harmless his securities, which recites that the grantor is indebted to his ward in an amount equal to, or greater than the value of the property conveyed by it, and authorizes the trustee to sell whenever he may think a sale most conducive to the advancement of the purposes of the trust, and to permit the grantor to retain the possession of all the property until the sale takes place, is not fraudulent on its face.—Hopkins v. Scott.... 179
2. When the grantor retains possession of the property, conveyed by deed of trust made in good faith, consistently with the terms of the deed, his possession is not a badge of fraud; and if it be merely permissive, it is not subject to levy and sale under execution at law..... 179

GAMING,
See Criminal Law.

GARNISHMENT.

1. Defendant sold and delivered to plaintiff a slave, in consideration that the plaintiff would pay all the debts then owing by defendant. Plaintiff afterwards commenced suit by attachment against C., to whom, at the time of the sale, defendant was indebted in the amount of a decree previously rendered against him in the Court of Probate in favor of C., and defendant was summoned as garnishee, and suffered judgment to be rendered against him, on which execution was afterwards issued. *It was held*, That the execution could not be set aside, and satisfaction of the judgment be entered, on proof of this agreement.—Matthews v. Robinson..... 130
2. When the service of an original attachment is only made by the summons of a garnishee, it is erroneous to render judgment against the defendant in attachment, until the garnishee has admitted a debt due, or property in his hands, or until a final judgment has been rendered against him for his default.—Bratton v. McGlothlen..... 146
3. Garnishment only lies to subject those demands for which the defendant in attachment could maintain debt or *indebitatus assumpsit*.—Cook v. Walthall..... 334
4. Two attachments, issued by a justice of the peace, were levied by a constable on certain personal property of the defendant, and plaintiff's attachment was levied soon afterwards by the sheriff on the same property; several other attachments were subsequently issued by the justice, and were also levied by the constable on the same property, and judgments having been afterwards rendered by the justice in all the attachment suits pending before him, the property was sold by the constable, and the proceeds of sale paid over to the justice; plaintiff notified the justice that he claimed the surplus remaining in his hands after satisfying the two at-

tachments first levied, but the justice disregarding the notice paid over the surplus to the junior creditors, and the plaintiff afterwards summoned him by process of garnishment as the debtor of the defendant. *It was held*, That these facts showed no debt or demand which could be reached by process of garnishment..... 334

5. When a suit is pending in one county, and a summons of garnishment arising out of it is sued out and sent to another county, and is returned executed by the sheriff of the latter county, and a judgment *nisi* is afterwards taken against the garnishee for failing to appear and answer, to authorize judgment final against such garnishee the writ of *scire facias*, issuing on the judgment *nisi*, must be sent to the county in which the garnishment was served, or in which the garnishee resides, and be returned by the sheriff of that county.—Morris v. Russell..... 357
6. On the trial of an issue contesting the answer of a garnishee, who denied an indebtedness to the defendant in attachment, the record of a judgment recovered by the defendant against the garnishee subsequent to the service of the garnishment, is admissible evidence for the plaintiff, to show the recovery of such judgment, and the time of its rendition.—Harrell v. Whitman 519
7. It is not error to instruct the jury, that they must find for the plaintiff, if they believe that the indebtedness on which the judgment against the garnishee was rendered existed prior to the service of the garnishment.. 519
8. When process of garnishment is sued out against a firm, and judgments *nisi* and final are rendered against them by default, and the names of the parties composing the firm no where appear in the proceedings against them, the judgment will be reversed, and judgment rendered in the Appellate Court quashing the proceedings.—James Reid & Co. v. McLeod.. 576
9. It is not necessary in such case that the defendant should plead the defect in abatement..... 576

HABEAS CORPUS.

1. Where a prisoner moves the Circuit Court for bail, and the court proceeds to examine fully the facts and circumstances attending the commission of the alleged offence, it is not error to refuse to permit the prisoner, after having submitted all the evidence, to withdraw his motion, since the State, as well as the prisoner, is interested in it. It is the duty of the court to proceed with the case, and either bail the prisoner, and thereby rid the State of the expenses of his custody, or remand him, as the facts may require.—Ex Parte Campbell..... 89
2. When an application for *habeas corpus* is made, to obtain the petitioner's discharge on bail, on account of a continuance of his case by the State upon the unsworn statement of the prosecutor, if the statement is reduced to writing and sworn to at the time the application is made, it is an answer to the application, and justifies the court in refusing the writ..... 89
3. Where the record of the court shows that the facts and circumstances, attending the commission of the offence with which a prisoner is charged, have been fully inquired into, on an application by the prisoner for bail, the court, although not bound to do so, may well decline to hear another application based on the same facts..... 89
4. Although the writ of *habeas corpus* is a writ of right, yet the courts will not grant it, unless the party applying for it shows such a state of facts as entitles him to relief..... 89

5. Notwithstanding a judgment refusing a discharge, upon an application for bail, does not conclude the party from again applying, yet it is within the sound discretion of the court, after having fully examined the facts and circumstances on the previous application, whether it will retry them upon a renewed application, or repose upon its former judgment; and this discretion will not be controlled by *mandamus*..... 89

6. The action of the Court of Probate on a writ of *habeas corpus*, cannot be reviewed in the Appellate Court on a writ of error.—Wilkinson v. Murphy..... 104

HUSBAND AND WIFE.

1. In detinue by husband and wife jointly, when the record shows such title in the wife as would vest a chose in action absolutely in the husband, and is silent as to the time of the wrongful taking and detainer by the defendant, the Appellate Court will presume in favor of the correctness of the judgment of the court below, that the proof showed such unlawful taking and detainer to have been before the marriage.—Mitchell v. Cowsert and Wife..... 186

2. In assumpsit by husband and wife jointly, for the use of the wife, when the declaration does not aver that the promise was made to the wife *dum sola*, nor that she was in any way the meritorious cause of action, it is demurrable; but if judgment is rendered by default against the defendant, and afterwards set aside on condition that he shall *plead to the merits*, the condition is not complied with by filing a demurrer, and assigning as cause of demurrer the want of such necessary averments in the declaration.—Quarles v. Waldron and Wife..... 217

3. The husband is a necessary party to the settlement of an estate, of which his wife is a distributee, had in the Court of Probate since the passage of the acts of 1848 and 1850, "securing to married women their separate estates."—Smith and Wife et al. v. Hooper, Ex'r..... 245

4. Therefore, an irregular final decree of settlement and distribution, had in the Court of Probate by consent of all the distributees of the estate, to which the husband was not a party, will be reversed on writ of error sued out by the husband and wife for the use of the wife in the name of all the distributees, although the wife appeared on the settlement by attorney in fact, and consented to all the proceedings..... 245

5. Husband and wife constitute in legal contemplation but one person, and cannot therefore, be domiciled in different States, so long as the relation remains unimpaired, upon which their legal identity depends.—Harrison and Saunders v. Harrison..... 629

6. Where the parties married in South Carolina, and there resided for several years, and afterwards removed to this State, where the husband permanently settled, the wife's *legal* domicil is in this State, notwithstanding she has been forced, by her husband's cruel treatment, to abandon him, and seek the protection of her friends in South Carolina..... 629

7. Where a husband purchases property with his individual means, and takes the title in the name of himself as trustee for his wife and children, such property will be subjected to the payment of his debts, on a deficiency of other assets; and in such case his personal representative must account for the rents and profits of the real property, and the hire of the personal property, from the service of the bill, if necessary to supply the deficiency. Pharis et al. v. Leachman, Adm'r, et al..... 662

8. Where slaves are sent home with a newly married couple by the wife's father, and are afterwards bequeathed by him to the wife for her sole and separate use, and the husband during his life treats them as his wife's property secured to her by her father's will, he will be held in equity to have elected to treat them as a loan, and not as a gift, and his representative is bound by that election.—Williams, Adm'r, v. Maull..... 721
9. Although courts of law cannot regard contracts entered into between husband and wife while that relation exists, yet courts of equity can recognize and enforce them, in favor of the wife against her husband's administrator, where the rights of third persons are not thereby injuriously affected.... 721
10. Where the husband purchases negroes in the name of his wife, takes the bills of sale in her name, and treats the negroes during his life as her property, and the property thus purchased is a reasonable provision for her under the circumstances of the case, a court of equity will uphold the transaction, and secure the property to the wife against the claim of her husband's administrator..... 721
11. The facts that the husband took the bills of sale in the name of his wife, and always recognized the property as belonging to her, disclaiming all ownership over it himself, are equivalent to a delivery of it to her, and a court of equity will regard the possession of husband and wife during his life, as the possession of the wife; and where the possession, under such circumstances, remains with the wife after her husband's death, equity will regard her as having a beneficial interest in the property, and not as holding in trust for her husband's administrator..... 721
12. Where a husband purchases and holds bank stock in his own name, as trustee for his wife, although the advancement will be held a valid gift as against his personal representative, yet the husband may revoke it at any time during his life, and a court of equity will subject it to the payment of his debts.—Gannard et al. v. Eslava et al..... 732
13. The case of Baker et al. v. the Heirs of Chastang, (18 Ala. 417,) touching the right of a married woman in this State to dispose of her real estate by will, and the effect of the probate of such a will, re-affirmed..... 732
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INDIAN RESERVATIONS.

1. When the Government of the United States has made an appropriation of land to an Indian reservee, under the treaty with the Creek tribe of Indians of 24th March, 1832, a patent subsequently issued by the Government cannot defeat the prior right of the Indian or his legal vendee.—Stephens v. Westwood..... 275
2. But although the patent in such case may be void, on account of the previous appropriation of the same land to an Indian reservee, yet the fact of the previous appropriation cannot be proved by the bare recitals in another patent subsequently issued, so as to enable the junior grantee to recover against the older..... 275
3. In trespass to try titles, where the plaintiff claims under patent from the United States Government to himself as the legal vendee of an Indian reservee under the treaty of March 24, 1832, and the defendant claims under an older patent from the Government, the plaintiff must prove the location of the Indian reservee, as well as that he succeeded to the rights of such reservee..... 275

INDICTMENT.

1. When an indictment is withdrawn from the docket, "on motion of the solicitor, the leave of the court being first had, with permission to reinstate it if necessary," and no other step is taken in the case for more than two years afterwards, the cause is discontinued.—Drinkard v. The State..... 9
2. A slave may be convicted of murder for the homicide of another slave.—Seaborn and Jim v. The State..... 15
3. The Statute requiring that not more than twenty, nor less than ten days, shall elapse between the time of sentence and execution, is directory merely; and if more than twenty days are allowed, the judgment of conviction is not thereby vitiated..... 15
4. A slave's voluntary confessions of guilt are admissible evidence against him. The facts that he is a slave, and ignorant, and to some extent unacquainted with the consequences which may attend the making of such confessions, do not affect the admissibility of the evidence, but should be considered by the jury, in connection with the admissions, in ascertaining the weight to be given to them..... 15
5. The caption of an indictment is that entry of record showing when and where the court is held, who presided as judge, the *venire*, and who were summoned and sworn as grand jurors; and this caption is a part of every indictment, and need not be repeated in any part of it.—Reeves v. The State..... 33
6. An indictment was entitled in the margin, "The State of Alabama, *Butler* county," and in the body of the indictment it was recited that "the grand jurors," &c. "of the county of *Buter* upon their oaths present," &c. The name of the county was not again repeated, nor was any other county named. The offence was charged to have been committed "*in the county aforesaid.*" *It was held*,
   That the indictment was not defective. The courts are bound to know the names of all the counties in the State; and there being no such county as *Buter*, the words "in the county aforesaid," must refer to the county stated in the margin of the indictment..... 33
7. In an indictment under the act of March 6, 1848, (Pamphlet Acts) charging the defendant with being "engaged in the business of hawking and peddling," it is unnecessary to allege the facts which constitute hawking and peddling. The gist of the offence under that statute is the *being engaged in the business* of hawking, &c.—Sterne v. The State..... 43
8. Where the offence charged is complicated, consisting of a repetition of acts, or where it includes a continuation of acts, it is not necessary to set them out in the indictment..... 43
9. The penalties prescribed in the act of March 6, 1848, are not repealed by the subsequent act of February 9, 1850..... 43
10. A count, in an indictment for obstructing a public road, which alleges that the defendant "a certain impediment, to wit: a large quantity of logs, sticks, brushwood and dirt, did erect and cause to be erected," &c. is good.—Sabra Thompson v. The State..... 54
11. It is not necessary that the width or grade of the road charged to have been obstructed should be set out in the indictment..... 54
12. A crop which is sown or planted in an enclosure after the Commissioners' Court has passed an order establishing a road through it is not a "growing crop," within the protection of the statute, (Clay's Digest, 507,

§ 4) although it may be growing at the time the road is ordered to be cut out..... 54
13. A literal interpretation, which would defeat the purposes of a statute, will not be adopted, if any other reasonable construction can be given to it 54
14. When a person is indicted for obstructing a public road, and it is shown that he had extended his fences across the road while a former order of the Commissioners' Court establishing it, which was afterwards quashed by the Circuit Court, was in full force, the record of the former proceedings had by the Commissioners' Court is irrelevant and inadmissible to show the defendant's motive in obstructing the road after it had been again established..... 54
15. And the admission of the record for that purpose is an error for which the judgment of conviction will be reversed..... 54
16. The sureties on a forfeited recognizance cannot, by a demurrer to the *scirc facias*, test the legal sufficiency of the indictment against their principal. A demurrer to the *scire facias* can reach no further than the recognizance on which the judgment *nisi* is founded.—Williams, Tucker et al. v. The State..... 65
17. An indictment which charges that the defendants, a man and a woman, "did live together in fornication," is sufficient.—Lawson and Swinney v. The State..... 65
18. An indictment is good which purports to be found by "the grand jurors for the said State, sworn and charged to inquire for the said county," when the names of the State and proper county are stated in the margin. 65
19. In all cases, whether civil or criminal, involving a charge of illicit intercourse within a limited period, evidence of acts anterior to that period may be adduced in connection with, and in explanation of, acts of a similar character occurring within that period, although such former acts would be inadmissible as independent testimony, and, if treated as an offence, would be barred by the statute of limitations..... 65
20. Acts of indecent familiarity within the limited period cannot be explained by proof of the subsequent illicit intercourse of the parties; but when such acts of indecent familiarity have been explained by previous acts of illicit intercourse, then proof of the subsequent illicit intercourse becomes corroborative or cumulative evidence, and is admissible..... 65
21. When a man and woman are jointly indicted and tried for living together in fornication, the confessions of the woman are admissible evidence against herself..... 65
22. But it is the duty of the court to caution the jury that such confessions can operate only against the party making them, and that the other defendant cannot be convicted, except upon evidence *aliunde* sufficient to establish his guilt..... 65
23. The admission of the woman that her co-defendant was the father of a bastard child, of which she was delivered more than twelve months after the finding of the indictment, is admissible evidence against her, its relevancy being shown by connecting it with other acts occurring before and within the period covered by the indictment..... 65
24. The refusal of the male defendant to pay the physician for his professional services rendered during the confinement of the woman, and his declaration that the child was not his, are not admissible evidence for him, when unconnected with any conversation or admission offered by the State against him..... 65

25. The fact of illicit connection between a man and woman is one which, from its nature, can very rarely be directly proved, and must, in the great majority of cases, be inferred from circumstances, the weight and conclusiveness of which vary according to the situation and character of the parties, the habits of society, and other incidental circumstances..... 65
26. A conversation carried on in the presence of the woman, and in the room where she was lying, a few minutes after she had been delivered of a child, between her mother and the attending physician, as to the person to whom the latter should look for payment of his professional services, in which conversation she took no part, is not admissible evidence against her, as tending to show her acquiescence in the truth of their statements.. 65
27. When the time of the commission of the offence charged is averred in an indictment under a *videlicet*, the prosecutor is not held to proof of it as laid; but he may prove that the offence was committed at any time before the finding of the indictment within the period prescribed as a bar.--McDade v. The State..... 81
28. An indictment under the eighth section of the fourth chapter of the Penal Code, (Clay's Digest, 435, § 8,) which charges the defendant with selling "*to a certain slave, whose name is to the jurors unknown,*" is fatally defective, on demurrer, for uncertainty.—Francois v. The State..... 83
29. As a general rule, when an indictment is defective on demurrer, advantage may also be taken of the defect on motion in arrest of judgment..... 83
30. A neighborhood road is a "public place" within the statute against gaming, it being shown that the playing took place near an assemblage of persons, some of whom were looking on at the playing, and others passing about at the time.—Mills v. The State..... 86
31. The term "highway," as used in the statute against gaming, means a public road, one dedicated to, and kept up by the public, as contra-distinguished from a private way or a neighborhood road..... 86
See Criminal Law.

INSOLVENT ESTATES.

1. A claim against an estate regularly declared insolvent, which has been filed in due time with the clerk, having been taken from the office for a special purpose with the permission of the Judge of Probate, and not having been returned through inadvertence, does not lose its place as a claim filed in time, because it cannot be found in the office on the last day allowed by law for filing written objections to claims which had been filed against the estate.—Ross v. Ross..... 105
2. In contests under the statute (Clay's Dig. 194,) between the creditors of an insolvent estate, it is a proper practice for the creditor, against whose claim an objection in writing has been filed, to declare upon it, as in a suit at common law, against the administrator *de bonis non* (defending in behalf of the objecting creditor,) as defendant; and the declaration is not demurrable because the creditor, as plaintiff, *declares against himself*, as administrator *de bonis non*, as defendant..... 105
3. A writ of error does not lie to reverse a decree of insolvency until a final decree of settlement has been rendered, unless an issue has been made up and tried under the act of 1843.—Black's Creditors v. Black's Adm'rs... 401
4. If an issue is made up and tried, under the act of 1843, a writ of error can only be sued out within a year from the trial of such issue..... 401

5. A report of the insolvency of an estate which is in the name of both the executors is sufficient, although it is signed by one of them only, and verified by his oath alone; the report having been adopted by the other executor, and having been treated as a sufficient report by the court in ordering a sale of the decedent's lands.—Steele v. Weaver's Ex'rs... 540
6. When an estate was reported insolvent previous to the act of 1843, but no progress was made in the settlement until afterwards, the subsequent proceedings must be regulated by that act..... 540
7. But the creditors in such case would only be bound to file their claims against the estate within the time prescribed by the court under the previous law, and the right to file claims would also be limited to the time so prescribed..... 540
8. The law previous to the act of 1843 made no provision for contesting claims between the creditors; when, therefore, the settlement of an estate, which was reported insolvent previous to the passage of that act, is to be made through an administrator *de bonis non* under the act, the common law rule would prevail, that written objections to claims should be filed within a reasonable time after the appointment of an administrator *de bonis non*..... 540
9. An estate having been reported insolvent, and notice given to creditors to file their claims against it, under the law existing previous to the act of 1843, and no other proceeding being had until after the passage of that act, it is error for the court to proceed at once to a settlement with the executors, against their objection.—Weaver's Ex'rs v. Weaver's Creditors... 557
10. The next step in the proceedings should be, the appointment of a day for the executors to settle, and notifying the creditors to attend; on that day the court should proceed to settle with the executors, and the creditors to choose an administrator *de bonis non*, and thenceforward all the proceedings should conform to the act of 1843..... 557
11. When a claim against an insolvent estate is properly filed in the Court of Probate, and its validity is not contested by the administrator, or a creditor in the name of the administrator, in the manner prescribed by the act of 1843, the affidavit of the claimant is sufficient to establish it. In such case, the Judge of Probate has no power to call for other proof; if the affidavit is regular, it only remains for him to allow the claim, and charge the estate with its payment *pro rata*.—McNeil v. Macon's Adm'r. 772
12. When the record shows, that a claim against an insolvent estate was properly filed in the Court of Probate, verified by the affidavit of the claimant, and that other evidence as to its validity was afterwards adduced before the judge, who rejected some of it, and considered the remainder insufficient to establish the claim, which he consequently refused to allow; and it is not shown by the record, either affirmatively or by fair implication, that the administrator, or any creditor in his name, ever called in question the justness or validity of the claim, nor that any issue was made up to test it, the proceeding is wholly without authority of law, and the judgment of the court rejecting the claim will be reversed on error.

(Chilton, J., *dissenting*, held, that in such case, if the record fails to show that the plaintiff in error raised any objection in the court below to the mode of procedure, or that he was forced to adopt it, or that a jury was denied him; and the only errors assigned are, the rejection of the claim and the

exclusion of the evidence, then the bill of exceptions should be construed most strongly against him, and the Appellate Court should presume, that a formal issue was waived, and that the plaintiff consented to substitute the judge for the jury, in which case the decision of the court could not be reviewed, except in the exclusion of the evidence..... 772

13. In such case, the rejection of the claim is a final judgment, which will support a writ of error..... 772

14. When the Orphans' Court has acquired jurisdiction of the settlement of an estate, by the report of insolvency, personal notice of the subsequent proceedings to the administrator, is unnecessary; he is considered the actor, and is held to notice all subsequent proceedings.—Watts et al. v. Gayle & Bower et al..... 817

15. A decree of the Orphans' Court against an administrator, rendered previously to the passage of the act of 1843, is equally conclusive upon him and his securities, both as to the claims allowed against the estate, and the assets in the administrator's hands; and the securities, in the absence of fraud, cannot litigate any question, except those which may arise upon the *factum* of the bond, or its legal sufficiency..... 817

INTENDMENTS, AND LEGAL PRESUMPTIONS.

1. The proceedings of the courts of the several States composing the United States, will be presumed to be governed by the common law, until the contrary is shown.—Hinson v. Wall..... 298

2. It is not ordinarily necessary that the record should show that the administrator made the affidavits required by law, in regard to the use of the money of the estate and the names of the heirs and legatees. They will be presumed to have been made, in the absence of an exception for the want of them.—Clack's Heirs v. Clack's Adm'rs..... 461

3. When filiation is once established, the law raises the presumption of legitimacy, and the burden of proof is cast upon those who assert the illegitimacy.—Weatherford v. Weatherford..... 548

4. But when the evidence, by which filiation is established, also proves illegitimacy, the presumption of legitimacy does not arise..... 548

5. The presumption of an actual marriage arising from the fact of cohabitation may be rebutted, by proof of a subsequent permanent separation between the parties, without any apparent cause, and the marriage of one of them soon afterwards..... 548

6. Where a receipt, which is given for a claim on a third person, expresses on its face that the claim is to be placed to the credit of a judgment, the presumption is that the claim is received as an absolute payment of the judgment *pro tanto;* and this presumption is not rebutted by proof that such third person was insolvent at the time, and that no portion of the claim could have been collected from him.—Pharis et al. v. Leachman, Adm'r, et al..... 662

INTEREST.

1. In an action of debt upon a judgment rendered in Mississippi, it is error to render judgment final by *nil dicit*, without the intervention of a jury, for the amount of the debt and eight per cent. interest thereon as damages.—Clarke v. Pratt..... 470

2. The court cannot take judicial notice of the rate of interest in a sister State,

from the table of interest prepared by the Secretary of State and appended to the acts of the Legislature, as required by the act of 1848. The rate of interest must be ascertained by a jury, and the table appended to the acts is only *prima facie* evidence, which may be rebutted by other proof.. 470

3. In a suit upon a judgment or decree of another State, no interest can be allowed unless proof is made of the law prescribing the rate of interest in that State.—Harrison & Saunders v. Harrison..... 629

4. The Appellate Court cannot judicially notice the table showing the rate of interest in the several States, required by law to be appended by the Secretary of State to the published acts of the Legislature. It must be offered in evidence in the primary court, that the opposite party may have an opportunity to contest its correctness..... 629

5. The law will not, in the absence of an express stipulation between the parties, compel one partner to pay interest to his co-partners on the amount by which their capital exceeds his.—Desha & Sheppard v. Smith..... 757

JOINT TENANTS, AND TENANTS IN COMMON.

1. The statute of this State which abolishes the right of survivorship between joint tenants, (Clay's Digest, 169,) applies only to those who hold the absolute property in their own right, and not to those who hold as trustees merely, or in *autre droit*.—Parsons v. Boyd..... 112

2. A contract, by which the owner of land lets it to another, and agrees to receive as compensation, a portion of the specific products, is a letting on shares, although the words usual in leases are used; and a tenancy in common in the products is created.—Smith v. Tankersley..... 212

3. A sale of the entire property in a chattel, by one tenant in common, is a conversion, for which trover may be maintained by his co-tenant..... 212

4. The sale, by an officer, of the entire property in goods owned by two jointly, under an execution against one of them, is an abuse of his legal authority, which renders him liable as a trespasser *ab initio*..... 212

5. And if the wrong doer has sold the property, and received the money, the owner may waive the tort, and bring assumpsit for the money..... 212

JUDGMENT AND DECREE.

1. A paper purporting to be a decree on the final settlement of an estate, signed by the Judge of the Orphans' Court, and filed among the papers of the cause, with the endorsement thereon, "Decree in Est. of J. H., deceased, filed 2d Monday, April, 1847," also signed by the Judge, is not the judgment of the court until entered of record.—Hall v. Hudson, Adm'r... 284

2. A mere memorandum of the clerk stating the amount of damages assessed by the jury, with the words, "then judgment for" the sum so found, added, does not constitute a judgment on which an action of debt can be maintained, although the clerk certifies, in proper form, that it is "a true and perfect transcript and exemplification of the record.—Hinson v. Wall..... 298

3. The Circuit Courts have authority, under the statute of 1824, (Clay's Digest 322, § 55.) to amend a judgment at any time within three years after its rendition, by the correction of any clerical error or mistake, where there is sufficient matter apparent on the record to amend by.—Lee v. Houston, Adm'r..... 301

4. A *remittitur* of the damages recovered in an action of assumpsit having been entered by mistake, the judgment was set aside at the next term of

the court, on the motion of the plaintiff, and plaintiff then dismissed his suit; and at a subsequent term, the latter judgment was amended *nunc pro tunc*, so as to show that the defendant had appeared and consented to the vacating of the first judgment. *Held*,

That the appearance and consent of the defendant to the vacation of the judgment must be considered as a waiver of the proof required by the statute, or as a judicial admission of the facts necessary to authorize the court to set aside the judgment..... 301

5. A judgment rendered by a justice of the peace cannot be impeached, in a collateral proceeding, by proof that the warrant was not served on one of the defendants—Lightsey v. Harris..... 409

6. A judgment rendered by a justice of the peace, "for thirty-seven dollars and thirty cents, on note due 25th December, 1840, bearing interest from that date, and cost of suit," though informal, is not void for uncertainty. It is, in legal effect, a judgment for $37 30,. 409

7. The orders of a court acting without authority are nullities, and may be inquired into, and impeached, in all other courts, before which such orders are brought and relied upon by a party claiming a right or benefit under them.—Wightman v. Karsner..... 446

8. When a motion is made by the plaintiffs in a judgment to have certain moneys in the hands of the sheriff applied to the satisfaction of their judgment, which motion is entertained by the court and decided against them, the matter becomes *res adjudicata*, and the action of the court is conclusive until reversed, or otherwise set aside; and the plaintiffs cannot bring assumpsit against the sheriff for the money.—Langdon et al. v. Raiford... 532

9. A decree in chancery is binding on all who are parties or privies to it, and concludes them as to every fact necessary to be ascertained before the final decree was rendered.—Hutchinson v. Dearing 798

10. A decree of the Orphans' Court against an administrator, rendered previously to the passage of the act of 1843, is equally conclusive upon him and his securities, both as to the claims allowed against the estate, and the assets in the administrator's hands; and the securities, in the absence of fraud, cannot litigate any question, except those which may arise upon the *factum* of the bond, or its legal sufficiency.—Watts et al. v. Gayle & Bower et al..... 817

JUDICIAL SALES.

1. On a motion to set aside a sale made under execution by a constable, to which the purchaser at the sale and the constable are made defendants, it is not a good plea that the plaintiff in the motion had brought an action of trespass in the Circuit Court against the constable, for levying on and selling the property, and had recovered a judgment against him.—Staunton v. Simmons & Simmons..... 243

2. A sale for taxes due the city, made by the corporate authorities of the city of Montgomery, under the power conferred upon them by the act of incorporation, (see City Laws, 30,) has the force and effect of a sale under judgment and execution from the Circuit Court; a party, therefore claiming under such a sale must show that the requisitions of the statutes, as to the assessment of taxes and the subsequent proceedings relative thereto, were complied with.—Parker v. Doe ex dem. Burgen & Pearsall..... 251

3. Parol evidence cannot be received to show that a meeting of the Mayor

and Aldermen, or board of assessors, was held, as required by the statute, (City Laws, 30,) for the purpose of correcting and sanctioning the assessment..... 251

4. When the record of the proceedings of the corporate authorities does not show that such a meeting was held, the mere advertisement of the Mayor calling the meeting does not warrant the presumption that it was held... 251

5. Nor can the fact that the meeting was held be inferred from the fact that a sale of certain taxable property, assessed to persons unknown, was ordered by the City Council..... 251

6. When the decree of sale, in a suit for the foreclosure of a mortgage, authorizes the register to receive the amount bid and to make a conveyance, the bidder must be considered as the purchaser, from the time he receives a deed from the register. From that time the property is at his risk, and he cannot repudiate the contract, although the sale may be set aside, before confirmation, for irregularities.—Jones & Blair v. Burden..... 382

7. A judgment creditor may redeem lands sold under a decree of foreclosure, *before the sale is confirmed*, when the purchaser has paid the price and received a deed from the register..... 382

8. A purchaser who would prevent a redemption of the lands by a judgment creditor, by crediting the debtor with the amount proposed to be advanced, must also be a *judgment* creditor..... 382

9. The death of the judgment debtor after the sale under decree, does not affect the judgment creditor's right to redeem, although the lien of his judgment may be thereby lost..... 382

10. When an execution is levied upon the lands of the defendant, and before the sale another execution issued on an older judgment comes to the hands of the sheriff, the plaintiff in the senior judgment is entitled to the proceeds of sale.—Bagby, Gov., &c. v. Reeves et al..... 427

JURISDICTION.

1. Exclusive power over the importation of slaves is vested in Congress after the first day of January, 1808, by the ninth section of the first article of the Constitution of the United States.—The State ex rel. Savary v. Caroline, a slave, et al..... 19

2. The State courts could at no time exercise any jurisdiction in cases of violation of the laws prohibiting the slave trade, except such as were authorized by the Congress of the United States; and all jurisdiction is now taken away from them, by the fourth section of the act of Congress, approved March 3, 1819..... 19

3. When a court has no jurisdiction over the subject matter of a suit, neither the express nor the implied consent of the parties will confer it..... 19

4. The Court of Probate has not jurisdiction to compel an administrator to convey his intestate's interest in certain lands, which were sold by a firm in which the intestate was a partner, unless the intestate had entered into "bond or obligation to make title thereto."—Wilkerson, Admr. v. Vinson. 131

5. Where the subject matter of the suit is without the jurisdiction of the court, consent of parties cannot confer such jurisdiction, and much less can it be conferred by mispleading.—Jeffries v. Harbin et al..... 387

JUSTICES OF THE PEACE.

1. Before the passage of the act of 1850, (pamphlet Acts 81,) in cases of forcible entry and detainer, unlawful detainer, &c., removed into the Circuit

Court by *certiorari*, a trial must have been had on an assignment of errors on the record sent up by the justice of the peace, and not *de novo;* and if the party whose duty it was to assign errors, failed or refused to do so, the judgment of the justice must have been affirmed.—Mahan v. Lester..... 162

2. The act of 1850, which requires a trial *de novo* to be had in such cases, does not apply to cases which had been removed to the Circuit Court, and which were there pending at the passage of the act..... 162

3. A justice of the peace has no jurisdiction of a suit against the commissioners of the sixteenth section, for a refusal on their part to pay over to a legal voter of the township, his proportionate share of the school fund.—Jeffries v. Harbin et al..... 738

LIMITATIONS, STATUTE OF.

1. An admission that the debt is *then due*, or that a liability *then exists*, will remove the bar of the statute of limitations, and revive the cause of action. Such an admission includes, not only an acknowledgment of the correctness or justice of the demand, but also a willingness to pay it.—Ross v. Ross..... 105

2. The implied promise to pay, arising from such an admission, is as effectual to remove the bar of the statute of limitations and revive the debt, as an express promise..... 105

3. A charge which asserts, "that it requires an express promise, or something equivalent to an express promise, to revive the original cause of action after the statute has effected a bar," is erroneous; because it admits of two constructions, one of which asserts an incorrect legal proposition.. 105

4. A sole executor may, by his admission, remove the bar of the statute of limitations, and revive a cause of action against the estate which he represents; and his admissions will bind the estate after his death.—Townes & Nooe, Exrs. v. Ferguson..... 147

5. An admission made by a sole executor, after the statute of limitations had completed a bar, in these words, "The account is a good one, but I cannot pay it before January, at which time I will be receiving money for the hire of negroes." *Held* sufficient to remove the bar of the statute, and to revive the cause of action against the estate..... 147

6. When a clerk has collected money on a judgment, the statute of limitations does not begin to run in his favor until he is guilty of some default with respect to it; if he is shown to have converted it, a demand is unnecessary, and the statute begins to run from the time of the conversion; but if no conversion is shown, the statute begins to run from the time of a refusal to pay on demand.—McDonnell v. Br. Bk. Montgomery..... 313

7. The demand in such case must be made within a reasonable time after the collection; and what is a reasonable time must depend upon the peculiar circumstances of each particular case..... 313

8. When the declaration contains only the common counts, and the statute of limitations of *three years* is pleaded as a bar, the plea is bad unless it avers that the plaintiff's demand is for an open account; and this, though the statute is "pleaded in short by consent."—Brooks v. McFarland..... 483

9. Where an account which is barred by the statute of limitations is sent through the Post Office by the creditor to his debtor, at the request of the latter, who does not respond to the letter for several years, nor make any objection to the account, it does not thereby become a *stated account*, so

as to revive the debt and remove the bar of the statute of limitations.—Bryan v. Ware et al..... 687

10. Where an account is placed, together with a number of others, in the hands of an attorney for collection, proof that the debtor came several times to his office, and examined the bundle of accounts in which it was filed, and made no objection to either the correctnesss or justice of any of them, is sufficient to charge him with an acknowledgment of the justness of the demand.—McCulloch, Admrx. v. Judd, Sons & Co..... 703

11. In a suit upon an account for goods sold and delivered, where the defendant pleads the statute of limitations of three years, and the plaintiff replies specially "that the account was between merchant and merchant," proof that the plaintiff and defendant were both merchants at the time the goods were sold is not, of itself, sufficient to support the replication..... 703

12. An account containing several items of debit against the defendant for goods bought, and a single item of credit for cash paid, is not an account arising out of "the trade of merchandize between merchant and merchant," within the proviso of the statute of limitations, (Clay's Digest 328, § 88.) 703

MANDAMUS.

1. Notwithstanding a judgment refusing a discharge, upon an application for bail, does conclude the party from again applying, yet it is within the sound discretion of the court, after having fully examined the facts and circumstances on the previous application, whether it will retry them upon a renewed application, or repose upon its former judgment; and this discretion will not be controlled by *mandamus*.—Ex Parte Campbell..... 89

2. The refusal of the court to grant letters of administration to the sheriff, on the application of a party representing himself to be a creditor, is not an interlocutory or final order, within the meaning of the act of 1850, (pamphlet Acts 33, § 29,) from which an appeal lies. The party's remedy is by *mandamus*.—Brennan's Admr. v. Harris et al..... 185

3. When a cause is improperly stricken from the docket, *mandamus* is the remedy to procure it to be reinstated.—Ex Parte Lowe..... 330

4. A motion to quash an original attachment is addressed to the sound discretion of the primary court, and its discretion will not be controlled by *mandamus* from the Appellate Court.—Ex Parte Putnam..... 592

5. When an amendment is allowed to an original attachment by the primary court, *mandamus* does not lie to vacate the amendment..... 592

MARRIAGE AND DIVORCE.

1. A bill for a divorce is not demurrable, because it alleges two distinct grounds of divorce.—Morris v. Morris..... 168

2. When a bill alleges that the husband *drove his wife out of the house*, and that he lives in adultery with another woman, the case is within the statute, and is equivalent to an allegation that he "*abandoned her*," &c..... 168

3. In application for divorce, when the answer admits the marriage, proof that the parties had lived together as man and wife for more than forty years, is sufficient evidence of the marriage..... 168

4. The presumption of an actual marriage arising from the fact of cohabitation may be rebutted, by proof of a subsequent permanent separation between the two parties, without any apparent cause, and the marriage of one of them soon afterwards.—Weatherford v. Weatherford..... 548

5. Where the parties married in South Carolina, and there resided for sever-

al years, and afterwards removed to this State, where the husband permanently settled, the wife's *legal* domicil is in this State, notwithstanding she has been forced, by her husband's cruel treatment, to abandon him, and seek the protection of her friends in South Carolina.—Harrison & Saunders v. Harrison..... 629

6. No other State has jurisdiction to annul, or materially to impair the marriage relation between citizens of this State; and having no jurisdiction of the subject matter, consent of parties cannot confer it..... 629

7. Where the marriage was celebrated in South Carolina, and the husband, by his cruel treatment of his wife while domiciled in that State, compelled her to abandon him and return to her parents, and afterwards, by promises of amendment, persuaded her to return to him, which promises he never fulfilled, but removed with her to this State, and by his renewed misconduct and ill-treatment again compelled her to abandon him and seek the protection of her friends and relatives in South Carolina, where she subsequently filed a bill in equity to compel him to make provision for herself and her infant child, and to enjoin him from molesting her. *It was held*,

   1. That the decree of the Chancery Court in South Carolina, in accordance with the prayer of the bill, was but enforcing the duties and obligations of the marriage relation, and did not annul or materially impair it.
   2. That the condonation, on the part of the wife, of her husband's past transgressions, was rendered inoperative by his subsequent ill-treatment, and that she became thereby remitted to her original remedy against him.
   3. That the removal of the parties to this State did not deprive the wife of her remedy for past transgressions in the State of South Carolina.
   4. That the wife's actual residence in South Carolina entitled her to the remedies afforded by the courts of that State, for her personal security, and to the provisions usually made by those courts for maintenance consequent upon the husband's ill-treatment while domiciled within their jurisdiction, *provided*, the court could acquire jurisdiction over the husband.
   5. That the husband, by answering the bill without objecting to the jurisdiction of the court, will be held to have waived his right to make the objection, and to have conceded to the court the right to proceed..... 629

8. A decree for maintenance to the wife, rendered by the Court of Chancery in South Carolina, where no divorce is by law allowed, to continue until the reconciliation of the parties or the death of either one of them, cannot be enforced in this State against the husband who has subsequently obtained a valid decree of divorce in the courts of this State, *except* for the amount due upon the decree at the time the decree of divorce became effectual. But as to this amount, the subsequent decree of divorce is no estoppel, although the main allegations of the bill upon which the divorce is founded are in conflict with the allegations contained in the wife's bill for maintenance..... 629

MARRIED WOMEN, SEPARATE ESTATES OF.

1. Under the statute of distribution in this State prior to the passage of the acts of 1848 and 1850, an ante-nuptial agreement entered into between husband and wife, which stipulated that the wife "shall, during her natu-

ral life, have the sole management and control of" the slaves owned by her before marriage, "with the exclusive right to dispose of the same at her death," vests the entire estate in the slaves in the wife for her separate use; and if she die without disposing of them, they go to her administrator and next of kin, and not to her husband.—Randall, Admr. v. Shrader. 338

2. In the construction of marriage contracts, the question whether the wife, on the death of the husband, takes an absolute estate in the property brought by her into the marriage, is entirely one of intention, to be collected from the general frame of the instrument; and such intention will prevail, although contrary to the express words of a particular clause.—Saunders v. Saunders' Admr. 710

3. A marriage contract was executed between S. and his intended wife, M., which provided that each party should retain the exclusive interest in all property, of whatever kind, owned by him or her respectively, at the time of the marriage, or afterwards acquired by purchase, gift, devise, bequest, or descent, and disclaim all interest in the property of the other. The instrument also contained the following clauses, viz: "And it is here fully and expressly intended to be understood, and so agreed, covenanted, and sanctioned, that nothing is intended by this instrument, or other contract or understanding, to deprive either the said S. or M. from all and every right to have, hold and enjoy all the provisions, benefits, &c., of the law, as now, or may be hereafter provided or enacted, governing estates, after the death of either of the said parties; that the full intent and meaning of this instrument is, that, at the death of either said S. or M., this instrument, with all its meaning, shall cease to be of any effect, and of no avail, void and dead, and the surviving party enjoy all the privileges, rights, and immunities, as though no contract ever existed, or written instrument had between them, and nothing is intended to prevent the law from the control, management, &c., as though no contract did ever exist; and nothing shall be so construed as to prevent the subscribing parties from mutually enjoying the goods, chattels, or effects of any kind, in the usual common comforts and necessities of life, or for the peace, happiness, prosperity and advancement of the parties and their families. In witness whereof, and intending this instrument, with all its meaning, to cease to be of any effect, to be void, cancelled, annihilated, and forever cease to be of any meaning, and of no effect, at the death of either of the parties, the parties have hereunto set their hands," &c. *It was held,*

That the wife, upon the death of the husband, took an absolute estate in the property brought by her into the marriage 710

4. A will contained the following clause: "I give and bequeath to my daughter M., to be held in trust by my executors, for her use during her natural life, and then for the heirs of her body forever, the following negroes, (naming them,) together with their increase. It is my will and desire, that the labor and increase of the said negroes shall, in no manner whatever, be liable for the debts of her present or any future husband." The will also provided, that if the said M. should die "without leaving issue," then the executors should sell the negroes, and divide the proceeds among the testator's heirs at law then living. *Held,*

That, *as against the personal representative of the husband,* the will created a *separate estate* in the wife, which a court of equity would protect. —Williams, Admr. v. Maull 721

5. A court of equity is the proper forum in which a wife should litigate with her husband's personal representative, her right to property which she claims against him, as her separate estate under her father's will and by post-nuptial contract with her husband..... 721

MISTAKE.

1. The Circuit Courts have authority, under the statute of 1824, (Clay's Digest 322, § 55,) to amend a judgment at any time within three years after its rendition, by the correction of any clerical error or mistake, where there is sufficient matter apparent on the record to amend by.—Lee v. Houston, Admr..... 301
2. In assumpsit on a promissory note, a judgment by default having been rendered, the clerk of the court made a mistake in computing the interest due on the note, and judgment was entered for less than the amount really due. The defendant took the case to the Supreme Court, by writ of error, at the term next ensuing, but neglected to file the transcript, and the judgment was affirmed on certificate. *Held*,
   That the plaintiff in the original judgment is entitled to go into equity to have the mistake corrected. (Dargan, C. J. and Chilton, J. *dissenting*.) —Norris, Stodder & Co. v. Cottrell et al..... 304

MORTGAGE.

1. The possession of the mortgagee under the mortgage before the law day is not adverse to the mortgagor.—McGuire v. Shelby..... 456
2. A mortgagee who is in possession of the mortgaged property before the law day under the mortgage, is bound to account to the mortgagor for the rents and profits, unless there is a stipulation to the contrary in the mortgage.—Davis v. Lassiter..... 561
3. And parol evidence cannot be received, to show that by the terms of the contract he was to have the possession of the property without accounting for the rents and profits..... 561
4. A mortgagor in possession may hire or lease the mortgaged property, and receive the rents and profits, until the mortgagee notifies the lessee or hirer not to pay such rents or profits to the mortgagor.—Hutchinson v. Dearing..... 798
5. Notice from the mortgagee to the lessee or hirer, not to pay the rents or profits to the mortgagor, intercepts the rents and profits then due and unpaid, as well as those which may subsequently accrue, and the mortgagee becomes entitled to them..... 798
6. Where a mortgagor of slaves put them into the possession of his son-in-law, under the belief that they would be more profitable under his control, and for the purpose of enabling himself the more readily to pay off the mortgage debt, and with the agreement between them that when the debt was paid, they should come to some understanding respecting the value and ownership of the slaves, and the mortgagee was apprized of this agreement, and assented to it, he may, after notice to the son-in-law, bring assumpsit against him for the services of the slaves, notwithstanding he has previously filed a bill of foreclosure, and obtained a final decree thereon; *Provided*, it appears that the son-in-law was not made to account for said hire by the bill..... 798

NON-CLAIM, STATUTE OF.

1. Where the defendants claim the benefit of the statute of non-claim by

way of plea, but do not positively deny in their answers the presentation of complainant's demand, proof of presentation by one witness is sufficient. Pharis et al. v. Leachman, Adm'r. et al. 662

2. In a suit against an administrator, his admissions of the presentation of the demand are sufficient to take the case out of the statute of non-claim, although such admissions are made after the lapse of eighteen months from the grant of letters of administration 662

3. Where the suit is in chancery, for the purpose of subjecting to the payment of the intestate's debts, property which is standing in the name of a trustee for the benefit of his wife and children, and which is alleged to have been purchased by the intestate with his individual means, and fraudulently added to the trust estate, the admission by the administrator of the presentation of the complainant's demand is evidence, not only against the administrator, but also against the *cestuis que trust* 662

4. A payment on a claim, made by the administrator after the lapse of eighteen months from the grant of letters of administration, is a fact tending to establish its due presentation within eighteen months 662

5. The report of insolvency made by the administrator after the lapse of eighteen months from the grant of letters, in which he has returned a claim as a subsisting debt against the estate, is evidence of its due presentation 662

NOTICE.

1. Whatever is sufficient to put a party upon inquiry, is sufficient to charge him with notice; and a want of notice of a fact, resulting from a failure to use proper diligence to ascertain it, furnishes no protection to a party. McGehee v. Gindrat 95

2. A debtor, against whom a judgment had been recovered in the name of his nominal creditor, for the use of a fictitious person, applied to the attorney of record, who was also the attorney of the real owner of the judgment, to know who was the true owner, that he might settle the judgment with him. The attorney, acting under the instructions of the real owner, refused to disclose his name, but informed the debtor that the nominal plaintiff had no right to settle the judgment, and that it had been transferred to one of his creditors. The debtor afterwards settled the judgment with the nominal plaintiff, and the sheriff returned the execution satisfied. On motion by the plaintiff, to have the return set aside, *it was held,*

That the defendant could not be charged with implied notice, from the vague information communicated by the attorney, on the ground that it was sufficient to put him upon the inquiry, since the inquiry, *as to the real owner*, had been made, and had proved futile 95

3. An attorney will be presumed to have read a declaration to which pleas are filed in the name of a firm of which he is a partner; and the record of the suit in which such proceedings were had, is admissible evidence in a subsequent suit against the attorney, to prove actual notice to him of the plaintiff's title, as set out in said declaration.—Parsons v. Boyd 112

4. When the record shows that the plaintiff in the judgment, on which the execution issued which was sought to be superseded, was a party to the proceedings had upon the *supersedeas*, it cannot be assigned for error, that he had no notice of the proceedings.—Br. Bank Mobile v. Coleman .. 140

5. The notary who protests a bill of exchange, is authorized to give notice of its non-payment; and such notice may be given by mail, although the actual holder and the party to be charged reside in the same place.—Greene v. Farley 322
6. When the Orphan's Court has acquired jurisdiction of the settlement of an estate, by the report of insolvency, personal notice of the subsequent proceedings to the administrator, is unnecessary; he is considered the actor, and is held to notice of all subsequent proceedings.—Watts et al. v. Gayle & Bower et al. 817

PARENT AND CHILD.

1. Filiation may be established, at common law, by a satisfactory combination of facts indicating the connection of parent and child between an individual and the family to which he claims to belong; and the principal of these facts are, that he has always borne the name of the person whom he claims as his father; that the father has treated him as his child, and in that character has provided for his education, his maintenance, and his establishment; that he has been uniformly received as such in society; and that he has been acknowledged as such by the family.—Weatherford v. Weatherford 458

PARTNERSHIP.

1. A creditor may sue one or all of the members of a firm, on a debt contracted in the firm name, and may declare on the demand as the individual liability of the partner or partners sued.—McCulloch, Adm'r, v. Judd Sons & Co. 703
2. Under the statute of this State (Clay's Digest 324 § 67) a creditor may proceed to judgment against the personal representative of a deceased partner, and have execution against him for his recovery, *provided*, he makes the affidavit required by the statute; or he may proceed to judgment, without making the affidavit, but cannot have execution until he has sued the surviving partners to insolvency 703
3. The law will not, in the absence of an express stipulation between the parties, compel one partner to pay interest to his co-partners on the amount by which their capital exceeds his.—Desha & Sheppard v. Smith 747
4. But partners may enter into such stipulations respecting the division of the profits, or the advantages which each is to derive therefrom, as they may see fit, unless their pretended contract is a mere device or cover for usury; and such contract, being legal, would form the rule by which the rights of each, in the settlement of their joint affairs, would be ascertained and adjusted 747
5. The books of a firm, to which all the partners have had free access, are evidence for and against each partner, in setting the partnership accounts; and the entries therein must be considered at least *prima facie* correct ... 747
6. When the partnership accounts have been made out and settled after full deliberation, it requires clear and convincing proof of error, and further that this error was unknown at the time of the settlement to the party complaining, to induce a court of equity to open the account 747
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PLEADING AND PRACTICE AT LAW.

1. The sureties on a forfeited recognizance cannot, by a demurrer to the *scire facias*, test the legal sufficiency of the indictment against their principal. A demurrer to the *scire facias* can reach no further than the recognizance on which the judgment *nisi* is founded.—Williams, Tucker et al. v. The State..... 63
2. When the time of the commission of the offence charged is averred in an indictment under a *videlicet*, the prosecutor is not held to proof of it as laid; but he may prove that the offence was committed at any time before the finding of the indictment within the period prescribed as a bar.—McDade v. The State..... 81
3. As a general rule, when an indictment is defective on demurrer, advantage may also be taken of the defect on motion in arrest of judgment.—Francois v. The State..... 83
4. In debt on a prison bounds bond assigning breaches, it is a good plea that the prisoner, within sixty days from the date of said bond, surrendered himself to the jailor, without having committed any escape in the meantime. Harlan v. Thompson..... 94
5. When the defendant contests only a part of the plaintiff's demand, and asks a continuance of the cause, the court may require a confession of judgment for the sum admitted to be due, and grant a continuance as to the residue.—Gowen & Co. et al. v. Jones..... 128
6. If execution issues for the amount of the judgment confessed, and it is satisfied by the defendant, he cannot move to strike the case from the docket, nor take advantage of the payment by pleading a former recovery *puis darrein continuance*..... 128
7. A demurrer to a declaration cannot properly be said to be a *plea to the merits*, except in cases where a judgment on the demurrer in favor of the defendant would be a bar to a subsequent suit on the same cause of action; and this can never be the case where the declaration is defective only for the want of some necessary averment.—Quarles v. Waldron and Wife... 217
8. In assumpsit by husband and wife jointly, for the use of the wife, when the declaration does not aver that the promise was made to the wife *dum sola*, nor that she was in any way the meritorious cause of action, it is demurrable; but if judgment is rendered by default against the defendant, and afterwards set aside on condition that he shall *plead to the merits*, the condition is not complied with by filing a demurrer, and assigning as cause of demurrer the want of such necessary averments in the declaration..... 217
9. A motion to enter satisfaction of a judgment and a petition for a *supersedeas* are substitutes for the ancient writs of *audita querela;* and consequently, all issues of fact and matters *in pais* must be tried in the same manner as if the proceeding had been commenced by that writ.—Bruce, Adm'r, v. Barnes..... 219
10. On the trial of a motion to enter satisfaction of a judgment, the plaintiff has the right to demand a trial by jury, and to cross-examine all witnesses whose testimony is offered against him to prove the fact of payment..... 219
11. Where several persons join as plaintiffs in an action of assumpsit, and the plea is *non assumpsit*, evidence tending to show that the plaintiffs have a right to sue jointly, should not be excluded from the jury.—Kirkley v. Segar et al..... 226

12. When assumpsit is brought in the Circuit Court for a sum *exceeding fifty dollars*, it is not error to allow testimony to go to the jury proving an indebtedness of *less than fifty dollars;* nor is it erroneous for the court to charge the jury, that if they believe such proof, they can find for the plaintiff..... 226
13. In such a case, if the jury return a verdict for a less sum than fifty dollars, the plaintiff, on making the affidavit required by the statute, (Clay's Digest, 325, § 75,) will be entitled to judgment for the amount of the verdict with costs..... 226
14. In appeal cases the defendant may waive all objections to the mode in which he is brought into court, and submit the case, although involving more than fifty dollars, to the decision of the Circuit Court, which, by virtue of its general jurisdiction over the amount can determine it.—Vaughan v. Robinson..... 229
15. And by failing to plead in abatement in the Circuit Court, the want of jurisdiction before the justice, the defendant waives all objection on that ground..... 229
16. On a motion to set aside a sale made under execution by a constable, to which the purchaser at the sale and the constable are made defendants, it is not a good plea that the plaintiff in the motion had brought an action of trespass in the Circuit Court against the constable, for levying on and selling the property, and had recovered a judgment against him.—Staunton v. Simmons & Simmons..... 243
17. When a nonsuit is taken which is afterwards, on a subsequent day of the term, set aside "on the payment of all the costs of suit," and the costs are not paid until after the adjournment of court, the cause cannot be stricken from the docket on motion.—Parker v. Doe ex dem. Burgen & Pearsall... 251
18. In assumpsit against husband and wife, on a note executed by the wife *dum sola*, two writs having been issued, but only one served on each defendant in different counties, it is not error to refuse a motion to quash the writs, on the ground that there was no endorsement showing that they were for one and the same cause of action. Such objections must be pleaded in abatement, if the defendant wishes to avail himself of his right to review the decision of the court below.—Johnson & Wife v. King..... 270
19. Where a sheriff, having sold property under sundry executions, applies to the court out of which they issued, for directions how to appropriate the money, and several of the plaintiffs in execution except to the ruling of the court on such application, but one writ of error is allowable, to which all must be made parties.—Br. Bank, Decatur v. McCollum..... 280
20. When a new trial is granted to the defendant "on the payment of all the costs of suit," the order is not an *absolute*, but a *conditional* grant of a new trial, and its effect is to keep the cause in court *sub judice* until the next term.—Ex Parte Lowe..... 330
21. And if the costs are paid during vacation, or before the cause is called up for action by the court at the next succeeding term, the condition is complied with, and the effect of such a payment is to place the cause on the docket for trial..... 330
22. When a cause is improperly stricken from the docket, *mandamus* is the remedy to procure it to be reinstated.....330
23. A declaration, which unites a count against the defendant as administrator *de bonis non* with a count against him individually, is demurrable for

misjoinder of counts; and the objection may be taken on general demurrer to the whole declaration.—Godbold v. Roberts, Adm'r..... 354

24. In a declaration on a written agreement containing several distinct stipulations to be performed by the defendant, some of which have been performed, it is not necessary that the breach assigned should negative the performance of the defendant's contract *in toto*, but it will be sufficient if it avers non-performance in any one particular, and shows that the plaintiff has a good cause of action.—Montgomery Manufacturing Co. v. Thomas.. 473

25. When the declaration assigns a sufficient breach, and shows a good cause of action, unnecessary averments, which are added by way of inducing special damages, are mere surplusage, and furnish no ground for demurrer. 473

26. When the declaration contains only the common counts, and the statute of limitations of *three years* is pleaded as a bar, the plea is bad unless it avers that the plaintiff's demand is for an open account; and this, though the statute is pleaded "in short by consent."—Brooks v. McFarland..... 483

27. When a cause is submitted upon an agreed statement of facts, the court can only decide the questions of law arising upon those facts, and it will not infer the existence of other facts from those which are admitted.—Bott v. McCoy & Johnson..... 578

28. When the judge is substituted for the jury, by consent of parties, his decisions upon questions of fact will not be revised by the Appellate Court.. 578

29. When a cause is withdrawn from the docket, and leave given at the same time to reinstate it, but the cause is not reinstated and no steps are taken in regard to it until after the lapse of two years, the cause is discontinued, and cannot then be reinstated.—Griffin et al. v. Osbourne & Co..... 595

PRINCIPAL AND SURETY.

1. When an execution, which has been levied on property of the principal debtor sufficient to satisfy it, is returned by order of the plaintiff, and the property released, the surety is discharged.—State Bank v. Edwards & Walke..... 512

2. A security who has paid off a joint judgment, obtained by their common creditor against himself and his co-surety and their principal, is not entitled to a summary judgment on motion against his co-surety, either under the act of 1821 or that of 1839.—Nation v. Roberts..... 544

3. The acts of 1821 and 1839, (Clay's Digest 531, 533,) which give summary judgments in certain cases against securities, are in derogation of the common law, and must be so construed as not to embrace cases which are not within their legitimate meaning..... 544

PROBATE, COURT OF.

1. The action of the Court of Probate on a writ of *habeas corpus*, cannot be reviewed in the Appellate Court on a writ of error.—Wilkinson v. Murphy..... 104

2. A claim against an estate regularly declared insolvent, which has been filed in due time with the clerk, having been taken from the office for a special purpose with the permission of the Judge of Probate, and not having been returned through inadvertence, does not lose its place as a claim filed in time, because it cannot be found in the office on the last day allowed by law for filing written objections to claims which had been filed against the estate.—Ross (Creditor) v. Ross (Administrator.)..... 104

3. In contests under the statute (Clay's Dig. 194.) between the creditors of an insolvent estate, it is a proper practice for the creditor, against whose claim an objection in writing has been filed, to declare upon it, as in a suit at common law, against the administrator *de bonis non* (defending in behalf of the objecting creditor), as defendant; and the declaration is not demurrable because the creditor, as plaintiff, *declares against himself*, as administrator *de bonis non*, as defendant..... 105

4. The Court of Probate has not jurisdiction to compel an administrator to convey his intestate's interest in certain lands, which were sold by a firm in which the intestate was a partner, unless the intestate had entered into "bond or obligation to make title thereto."—Wilkerson, Adm'r. v. Vinson. 131

5. The husband is a necessary party to the settlement of an estate, of which his wife is a distributee, had in the Court of Probate since the passage of the acts of 1848 and 1850, "securing to married women their separate estates."—Smith and Wife et al. v. Hooper, Executor..... 245

6. Therefore, an irregular final decree of settlement and distribution, had in the Court of Probate by consent of all the distributees of the estate, to which the husband was not a party, will be reversed on a writ of error sued out by the husband and wife for the use of the wife in the name of all the distributées, although the wife appeared on the settlement by attorney in fact, and consented to all the proceedings..... 245

7. A paper purporting to be a decree on the final settlement of an estate, signed by the Judge of the Orphans' Court and filed among the papers of the cause, with the endorsement thereon, "Decree in Est. of J. H. deceased, filed 2d Monday, April, 1847," also signed by the judge, is not the judgment of the court until entered of record.—Hall v. Hudson, Adm'r.... 284

8. The Judge of Probate is not entitled to any fee for "certificates of filing bond for costs," nor for "filing depositions, and certificates of filing the same."—Rainer v. McElroy..... 347

9. A paper, purporting to be a final decree, ascertaining the amount in the hands of the administrator, and the share of each distributee of the estate, signed by the judge of the Orphans' Court, and filed among the papers of the cause, is insufficient to authorize the rendition of a decree at a subsequent term, *nunc pro tunc*, when it does not appear that it was ever recorded or entered on the minutes of the court, or that any note or memorandum of any final decree had been made in any book of the office.—Hudson v. Hudson..... 364

10. In revising a decree of the Court of Probate, it is competent for the Appellate Court to declare the proceedings regular to a certain point, and to reverse from the point where the first irregularity or error commenced. Jones. Adm'r. v. Dyer and Wife..... 373

11. But when a decree is generally reversed and remanded, the effect of the judgment of reversal is to vacate the decree *in toto*, and the parties affected by it then stand in precisely the same position as if it had never been rendered..... 373

12. Therefore, when a decree of the Court of Probate, rendered on the final settlement of an administrator's accounts, is generally reversed and remanded by the Appellate Court. the administrator may introduce additional evidence, on another settlement, to discharge himself of an item with which he was charged on the former settlement, and with which

the Appellate Court held he was properly chargeable on the evidence then before the court..... 373

13. When the record shows that there were minor heirs, it should also show that they were represented on the final settlement by a guardian, or guardian *ad litem;* and if it does not, the decree will be reversed on error.—Clack's Heirs v. Clack's Admr's..... 461

14. The settlement of an administrator, which has been commenced in the Orphans' Court, may be withdrawn from that tribunal, and taken into a Court of Chancery, whenever the powers of the former court are inadequate to the exigency, and cannot afford a sufficient remedy.—Pharis et al. v. Leachman, Adm'r. et al..... 662

15. Where a bill is filed by a creditor to pursue certain real and personal property, which is standing in the name of a trustee for the wife and children of the debtor, and which the bill alleges was fraudulently added to their estate by the debtor, and the debtor's estate has been reported insolvent, chancery may take jurisdiction of the case, and withdraw the administration from the Court of Probate..... 662

16. A legatee cannot proceed in the Court of Probate against an executor to recover a legacy, before the expiration of eighteen months from the granting of letters testamentary.—Horton, Ex'r. v. Averett..... 719

17. A judgment rendered by the Court of Probate against an executor, in favor of the legatee, before a final settlement of the estate by the executor, is erroneous..... 719

18. When a devisee's undivided interest in real estate is sold under execution at law against him, and the land is afterwards sold under an order of the Court of Probate, for the purpose of distribution, the purchaser at the sheriff's sale of the devisee's undivided interest, cannot petition the Court of Probate for a distribution of the proceeds of sale, under the statute which allows devisees, legatees and distributees to have a distribution of the estate after the lapse of eighteen months, (Clay's Digest, 196, §§ 23, 24,) (Dargan, C. J., and Ligon, J., *dissenting.*)—Smith & Loveless, Adm'rs. v. Hall..... 777

REDEMPTION OF LANDS.

1. A judgment creditor may redeem lands sold under a decree of foreclosure, *before the sale is confirmed,* when the purchaser has paid the price and received a deed from the register.—Jones & Blair v. Burden..... 382

2. A purchaser who would prevent a redemption of the lands by a judgment creditor, by crediting the debtor with the amount proposed to be advanced, must also be a *judgment* creditor..... 382

3. The death of the judgment debtor after the sale under decree, does not affect the judgment creditor's right to redeem, although the lien of his judgment may be thereby lost..... 382

RENT.

1. In assumpsit for the use and occupation of lands for two years, it is not error for the court to refuse to dismiss the suit, either of its own motion, or at the instance of the defendant, upon the plaintiff's statement that he had never claimed but for one year's occupation, and that the suit was brought at the instance, and for the benefit, of another person, who had indemnified him against the costs.—Smith v. Wooding..... 324

2. Nor is it error to refuse to permit such voluntary statement to be proven to the jury..... 324
3. When a vendee enters into the possession of land under a parol contract of purchase, by the terms of which he was to pay "$500 down, and $500 twelve months afterwards," and he entirely fails to pay the purchase money, and, after remaining in possession for more than twelve months, abandons the land, the vendor, if he is in no fault, may recover in assumpsit, for the use and occupation, the value of the land during the time the vendee so held it..... 324
4. An execution, which is levied on a crop of cotton after it has been removed from the rented premises on which it was raised, and stored in a warehouse by the tenant, is entitled to preference over an attachment subsequently levied on it at the suit of the landlord for the rent of the premises, the former levy being made in ignorance of the landlord's lien, both on the part of the sheriff and the execution creditor.—Governor v. Davis..... 366
5. In an action on a promissory note which purports on its face to have been given "for the rent of land," the defendant cannot introduce parol proof to show that the payee also agreed to repair the fencing around the land, and that he failed to do so, in consequence of which failure defendant's crop was damaged by the breaking in of stock.—Evans v. Bell..... 509
6. The plaintiff cannot recover under the common counts, in assumpsit for use and occupation, when the proof shows that there was a special agreement between the parties, by the terms of which the plaintiff was to receive a specified quantity of lumber for the rent of the premises, and it is not shown that by the agreement any value in money was placed on the lumber.—Oswald v. Godbold..... 811
7. The statute of this State (Clay's Digest 505, § 1) does not embrace those contracts for rent which contain a reservation of rent to be paid in specific articles, the value of which is not ascertained by the agreement of the parties..... 811

SCIRE FACIAS.

1. The sureties on a forfeited recognizance cannot, by a demurrer to the *scire facias*, test the legal sufficiency of the indictment against their principal. A demurrer to the *scire facias* can reach no further than the recognizance on which the judgment *nisi* is founded.—Williams, Tucker, et al. v. The State..... 63
2. When a suit is pending in one county, and a summons of garnishment arising out of it is sued out and sent to another county, and is returned executed by the sheriff of the latter county, and a judgment *nisi* is afterwards taken against the garnishee for failing to appear and answer, to authorize a judgment against such garnishee the writ of *scire facias*, issuing on the judgment *nisi*, must be sent to the county in which the garnishment was served, or in which the garnishee resides, and be returned by the sheriff of that county. Morris v. Russell..... 357

SET-OFF.

1. When a suit is brought against husband and wife on a note executed by the wife *dum sola*, the husband may set-off one-half of the amount paid by him before suit brought on a judgment which was recovered against the wife *dum sola* and the plaintiff, on a note executed by them jointly.—Johnson & Wife v. King..... 270

2. But he cannot set-off such a payment made by him after the institution of the suit..... 270
3. Therefore, where two such judgments were recovered, one of which was paid by the husband *before*, and the other *after* the institution of the suit, a charge that he was entitled "to set-off one-half of the amount paid by him on said judgments," is properly refused..... 270

SHERIFFS.

1. The payment, by the sheriff, of a judgment recovered against himself, for his failure to make the money on an execution, is not a satisfaction of the original judgment, unless the defendant adopts the payment, and insists upon it as a satisfaction of the judgment against himself.—Poe, Sheriff, v. Dorrah..... 288
2. If the sheriff pays off and discharges the judgment against himself, and the surety on the forthcoming bond insists on such payment as a satisfaction of the judgment on which he has become liable by reason of the forfeiture of the bond, he thereby becomes liable to the sheriff for money paid for his use..... 288
3. The release by the plaintiff of his own property, which had been levied on as the property of the defendant in execution, does not discharge the sheriff from liability, for not making the money out of property which really belonged to the defendant..... 288
4. Nor can the sheriff claim to be discharged from liability, because the plaintiff releases a levy on property to which a claim is interposed by a third person, and bond given to try the right of property according to the statute..... 288
5. A sheriff is not entitled to any fee for "entering and returning notices," nor for "entering subpœnas."—Rainer v. McElroy..... 347
6. A party injured by the sheriff's false return on a writ of *capias ad respondendum*, has his remedy against the sheriff. Or, if the writ be returned, "executed," when in fact it was not, and judgment by default goes against the defendant on a claim to which he has a good defence, chancery will afford relief.—Martin v. Barney..... 369
7. When a motion is made by the plaintiffs in a judgment to have certain moneys in the hands of the sheriff applied to the satisfaction of their judgment, which motion is entertained by the court and decided against them, the matter becomes *res adjudicata*, and the action of the court is conclusive until reversed, or otherwise set aside; and the plaintiffs cannot bring assumpsit against the sheriff for the money.—Langdon et al v. Raiford.. 532

SLANDER.

1. When "not guilty," and "justification," are pleaded to an action of slander, the latter plea does not amount to an admission of record of the speaking of the words charged. The statute (Clay's Digest, 332, § 109) confers upon the defendant the right to plead as many matters as he may think necessary to his defence.—Wright v. Lindsay..... 428
2. In an action of slander for words spoken, charging the plaintiff with stealing, if the words are proved to have been spoken in relation to a transaction which would not amount to a charge of larceny, such proof will protect the defendant from all legal consequences, except those resulting from *special* damages..... 428

SUMMARY JUDGMENTS.

1. An accommodation endorser of a bill of exchange is not entitled to a summary judgment, on motion against his principal, under the act of 1821, (Clay's Digest, 331, § 3.)—Stodder, Ex'r. v. Cardwell..... 223
2. When two persons sign their name to a blank form at the bottom of a writ acknowledging themselves security for the costs of suit, their contract is joint only, and not joint and several either at common law or under the statute of this State.—Boswell v. Morton..... 235
3. But when suit is instituted against one of them on their joint contract, he can only take advantage of the non-joinder of the other by plea in abatement..... 235
4. And when a motion is made for a summary judgment against one for the costs of the suit, and he does not interpose any objection on account of the non-joinder of the other, as a defence, he will be held to have waived it.. 235
5. A motion for a summary judgment against a security for the costs of suit may be made before the costs are taxed; and it is sufficiently certain by showing, that it is for cost, without setting out the amount or items of cost 235
6. A security who has paid off a joint judgment, obtained by their common creditor against himself and his co-surety and their principal, is not entitled to a summary judgment on motion against his co-surety, either under the act of 1821 or that of 1839.—Nation v. Roberts..... 544
7. The acts of 1821 and 1839, (Clay's Digest, 531, 533,) which give summary judgments in certain cases against securities, are in derogation of the common law, and must be so construed as not to embrace cases which are not within their legitimate meaning..... 544

SUPERSEDEAS.

1. When the record shows that the plaintiff in the judgment, on which the execution issued which was sought to be superseded, was a party to the proceedings had upon the *supersedeas*, it cannot be assigned for error, that he had no notice of the proceedings.—Br. Bank Mobile v. Coleman.. 140
2. When an issue is formed on the facts set forth in a petition for a *supersedeas* of an execution, it may properly be submitted to a jury for decision. 140
3. When an accommodation endorser of a note, on which judgment is recovered against him, files his petition for a *supersedeas* of an execution issued thereon, alleging satisfaction of the judgment, and issue is taken upon the facts set forth in the petition, the party, for whose accommodation he endorsed the note, may be rendered a competent witness for the petitioner by the execution of a release to him by the latter previous to the trial; and it is no objection to the release that it was delivered to the witness by the petitioner's attorney, when it is shown, that after its delivery, the petitioner acknowledged that he had released the witness..... 140
4. The proceeding by petition and *supersedeas* is not strictly a proceeding *at common law*, but it may properly be regarded as a substitute for *a bill in equity*, when the matter of discharge set forth in the petition does not appear in the record; when, therefore, the matter relied on by the petitioner would form a good equitable satisfaction of the judgment, which the execution is used to enforce, it may be inquired into in this way, and the execution perpetually superseded..... 140
5. A petition for a *supersedeas* of an execution may be verified by the oath of an agent..... 140
6. A motion to enter satisfaction of a judgment and a petition for a *supersc-*

deas are substitutes for the ancient writs of *audita querela;* and consequently, all issues of fact and matters *in pais* must be tried in the same manner as if the proceeding had been commenced by that writ.—Bruce, Adm'r, v. Barnes..... 219

7. On the trial of a motion to enter satisfaction of a judgment, the plaintiff has the right to demand a trial by jury, and to cross-examine all witnesses whose testimony is offered against him to prove the fact of payment..... 219

8. A petition for a *supersedeas* which alleges that the judgment "is satisfied," on which the execution issued which the party seeks to quash, is sufficient in law on demurrer.—Rice, Ex'r, v. Dillahunty..... 399

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1. To maintain trespass, the plaintiff must show in himself either actual possession or the immediate right of possession at the time of the tortious taking.—Davis v. Young..... 151

2. If the owner has neither the actual possession, nor the immediate right of possession at the time of the tortious taking, his remedy is case or trover. 151

3. If the original taking was not a trespass as against the plaintiff, the subsequent conversion of the property by the defendant will not make him a trespasser *ab initio*..... 151

4. When justification and the general issue are pleaded to an action of trespass, the plaintiff must show his actual possession, or immediate right of possession..... 151

5. In trespass against the sheriff for attaching plaintiff's goods as the property of his vendor, the vendor is a competent witness for the plaintiff to prove the fairness of the sale to him.—Zackowski v. Jones..... 189

6. The sale, by an officer, of the entire property in goods owned by two jointly, under an execution against one of them, is an abuse of his legal authority, which renders him liable as a trespasser *ab initio*..... 189

7. And if the wrong doer has sold the property, and received the money, the owner may waive the tort, and bring assumpsit for the money..... 189

8. When two persons jointly commit a trespass, the injured party may sue them severally; yet he can have but one satisfaction, and when separate judgments are recovered he must elect on which recovery he will seek it. Blann v. Crocheron..... 320

9. A plea setting forth a former recovery against a co-trespasser, and a voluntary payment of the damages and cost to the clerk in open court, by the defendant in that judgment, without averring that the plaintiff accepted such payment in satisfaction of his recovery, is bad on demurrer..... 320

10. When the injured party has severally sued two or more joint trespassers, and recovered separate judgments against them, his right to elect *de melioribus damnis* is not determined, until he sues out execution, or accepts satisfaction of one of the judgments..... 320

11. The "right to dig and carry away ore," from the mine of another, is an incorporeal hereditament, or easement; and any contract for the sale of such a right, to be binding in law, under the statute of frauds, must be in writing.—Riddle v. Brown et al..... 412

12. A verbal contract, conferring such a right, though not binding under the statute of frauds, will nevertheless operate as a verbal license, and, while unrevoked, will protect the person to whom it was given, from *trespass quare clausum fregit*, for digging ore, and vest in him the property in the ore that is actually dug under it..... 412

13. But such a verbal license is revocable, at the pleasure of the party by whom it is given; it is, moreover, personal, and not assignable..... 412
14. Such a verbal license, given by A to B, and by B afterwards transferred to C, will not justify C in entering by force the enclosure of A, in which the bank or mine of ore is situated, A being at the time the owner of the freehold, and warning C not to attempt to enter. C, in such a case, becomes himself a trespasser, and he may be repelled by A, with all the force necessary to protect his possession..... 412
15. One who enters into the possession of unoccupied lands without any claim of right or title, and for the purpose of keeping the true owner out of possession, is a trespasser.—McCall's Adm'r v. Capehart & Harbin..... 521

TRESPASS TO TRY TITLES.

1. When the Government of the United States has made an appropriation of land to an Indian reservee, under the treaty with the Creek tribe of Indians of 24th March, 1832, a patent subsequently issued by the Government cannot defeat the prior right of the Indian or his legal vendee.—Stephens v. Westwood..... 275
2. But although the patent in such case may be void, on account of the previous appropriation of the same land to an Indian reservee, yet the fact of the previous appropriation cannot be proved by the bare recitals in another patent subsequently issued, so as to enable the junior grantee to recover against the older..... 275
3. In trespass to try titles, where the plaintiff claims under patent from the United States Government to himself as the legal vendee of an Indian reservee under the treaty of March 24, 1832, and the defendant claims under an older patent from the Government, the plaintiff must prove the location of the Indian reservee, as well as that he succeeded to the rights of such reservee..... 275

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1. A *cestui que trust* of personal property cannot interpose a claim under our statute to try the right of property.—King & Co. v. Hill..... 133
2. The act of 1845, which renders the defendant in execution an incompetent witness on the trial of the right of property, is in derogation of the common law, and extends only to claim suits under the statute.—Zackowski v. Jones..... 189
3. On a trial of the right of property in slaves between the plaintiff in execution and the minor children of the defendant, the claimants cannot prove that it was a matter of public notoriety in the neighborhood, that defendant disclaimed all interest in, and ownership over, the slaves.—McCoy v. Odom..... 502

TROVER.

1. A sale of the entire property in a chattel, by one tenant in common, is a conversion, for which trover may be maintained by his co-tenant.—Smith v. Tankersley..... 212
2. A voluntary purchaser from an executor *de son tort*, when sued in trover by the rightful administrator, cannot show, in mitigation of damages, that since his purchase, the executor *de son tort* has paid debts which the administrator was bound to pay in due course of administration.—Carpenter v. Going, Admr..... 587

3. Whether under our statutes, the executor *de son tort*, when sued in trover by the rightful administrator, can show such payments in mitigation of damages, *Quære?* 587

4. In trover, the measure of damages is the value of the goods at the time of the conversion, or at any time subsequent thereto and before the trial, with interest on such value.—Ewing v. Blount 694

5. But this rule only applies when the property has not been regained by the owner. If the plaintiff has regained the possession, he is only entitled to recover damages equal in value to the use or service of the goods, and also compensation for any injury done to them; and if he is put to necessary and reasonable expense in regaining the possession, (otherwise than by suit at law,) he may recover such expenses from the wrong-doer.

[Ligon, J., *dissenting*, held, that if the plaintiff regains the possession pending the suit, and its value when so regained equals its value at the time of conversion, or at any time between its conversion and return, then the defendant is entitled to an abatement of the damages to the extent of this value, and that judgment should only go for the interest.] 694

TRUSTEES AND CESTUIS QUE TRUST.

1. The statute of this State which abolishes the right of survivorship between joint tenants, (Clay's Digest 169,) applies only to those who hold the absolute property in their own right, and not to those who hold as trustees merely, or in *autre droit*.—Parsons v. Boyd 112

2. If a power coupled with a trust be given to two or more, it may be executed by the survivor of them 112

3. When personal property is conveyed by deed of trust to two trustees, with power to sell and pay the debts intended to be secured, the survivor of the trustees has the entire legal title to the property, and may maintain detinue for its recovery 112

4. A *cestui que trust* of personal property cannot interpose a claim under our statute to try the right of property.—King & Co. v. Hill 133

5. Although the trustee's estate, after his death, is responsible to the *cestuis que trust* for the trust funds received by him, yet no lien accrues in their favor upon property purchased by him during his life, when no portion of the trust fund can be traced into such purchase.—Pharis et al. v. Leachman, Admr. et al. 662

6. Where slaves are bequeathed to a married woman and her children, and the will provides that the slaves shall be placed in the hands of a trustee, for her own use and the use of her children, and that no person shall deprive them of the same or any part thereof, and the slaves remain about the house, and in the possession of the husband and wife and their children, the condition of the trust is fulfilled, and the husband is not accountable for hire 662

VENDOR AND VENDEE.

1. An outstanding title to dower is such an incumbrance on land as will authorize a purchaser, who has contracted for a good and lawful title, to refuse to perform an executory contract for its purchase.—McLemore v. Mabson et al. 137

2. If the vendee has received a deed, and its covenants are broken by the existence of an outstanding incumbrance, it is competent for a court of equi-

ty, when the vendor is insolvent, to restrain the collection of so much of the purchase money as will compensate for the injuries resulting from the breach, or to order it to be appropriated to the extinguishment of the incumbrance..... 137

3. But when the vendee has received a deed with covenants, and has executed a mortgage on the land to secure the payment of the purchase money, he cannot resist a foreclosure of the mortgage in equity, by setting up in his answer that the vendor has broken the covenant in his deed, it not being shown that the vendor is unable to respond to the damages occasioned by the breach..... 137

4. In an action upon a covenant of seizin, the breach may be as general as the covenant.—Anderson v. Knox..... 156

5. A covenant of seizin is broken as soon as made, if the covenantor had no title to the estate granted..... 156

6. An unqualified covenant against incumbrances is broken by the existence, at the time of its execution, of an outstanding incumbrance; but if the covenant merely extends to quiet enjoyment against incumbrances, then it is broken only by an entry, or expulsion from the premises, or some disturbance in the possession..... 156

7. In an action on a covenant of seizin, or against incumbrances, if the plaintiff has bought in an outstanding title or incumbrance, he is entitled to recover the reasonable price which he has fairly and necessarily paid for it..... 156

8. But the amount paid by the plaintiff for such outstanding title or incumbrance is no evidence of its value, in the absence of all other evidence..... 156

9. The fact that the plaintiff offered to prove the reasonableness and fairness of the price paid by him for the outstanding incumbrance, and was prevented by an objection on the part of the defendant, which was sustained by the court, does not justify the jury in acting without proof, or in considering that as proof which would otherwise be incompetent..... 156

10. When the vendee enters into the possession of land under a parol contract of purchase, by the terms of which he was to pay "$500 down, and $500 twelve months afterwards," and he entirely fails to pay the purchase money, and, after remaining in possession for more than twelve months, abandons the land, the vendor, if he is in no fault, may recover in assumpsit, for use and occupation, the value of the land during the time the vendée so held it.—Smith v. Wooding..... 324

11. When several are bound by an executory contract to make titles to a vendee, all must join in the conveyance in order to a complete performance of the contract.—Johnson and Wife v. Collins..... 435

12. But when two or more are bound for the performance of one duty, and the obligee accepts from one of them something in satisfaction of the duty, and in lieu of a strict performance, this shall discharge all; for the obligation, being satisfied and discharged as to one, is necessarily satisfied and discharged as to all..... 435

13. When a bond for titles is executed by two, and the obligee afterwards accepts from one of them a deed executed by himself and a third person, it is a question for the jury to determine whether the deed was accepted in satisfaction of the bond..... 435

14. When an obligation is not completely performed, and the obligors insist upon satisfaction in lieu of performance, the burden of proof is upon them

to show that the thing done or given in lieu of performance *was accepted by the obligee and intended as a satisfaction*..... 435

15. When two execute a bond for titles, and the obligee afterwards accepts a deed executed by one of them and a third person, and subsequently releases the obligor who executed the deed from all the covenants therein contained, the release does not affect the liability of the obligors on their bond..... 435

16. A., supposing that he had title to a tract of land of which B. had possession, agreed to sell it to him, and executed a conveyance, with full covenants. It afterwards appeared, that A. had no title to the particular tract agreed to be sold, and that his deed to B. conveyed another tract, to which A. had title. Upon discovering the mistake, B. offered to return the deed, and to rescind the contract, which A. refused. Thereupon, B. sued at law to recover the purchase money, which he had paid. *Held*,
That he could not recover, and that equity alone could afford relief.—Homer v. Purser..... 573

17. Where a vendor conveys with covenant of warranty, and his vendee afterwards conveys portions of the land, with covenants of warranty, to two others, retaining a part himslf, and the three are evicted of an undivided third part of the land by title paramount to that of the original vendor, they may join as complainants in a bill against him, to reimburse themselves for the loss sustained by the breach of his warranty.—Gannard et al. v. Eslava et al..... 732

18. Where a deed contains a general covenant of warranty, and there is, at the time of its execution, a paramount outstanding title, by which the vendee may be, or actually is afterwards evicted, he is a "creditor" of the covenantor, within the meaning of the statute of frauds, (Clay's Dig. 254, § 2,) from the execution of the deed..... 732

WILLS.

1. A child born of a female slave, after the making of the testator's will, but before his death, does not pass under the will to the legatee to whom its mother is bequeathed, but goes to the executor as property unbequeathed. Hardy v. Toney..... 237

2. A condition annexed to the vesting of a legacy requiring the guardian's approbation of the legatee's marriage, is not *in terrorem* only, when the condition is confined to marriage under twenty-one, and there is a limitation over.—Collier, Exec'r. v. Slaughter's Adm'r..... 263

3. When a legacy is given, to vest upon the legatee's arriving at the age of twenty-one, or marrying before that time with the approbation of her guardian, and the legatee marries under twenty-one with the consent of her grandfather, with whom she is living at the time, this is not a compliance with the condition, although at the time her father and mother are dead, and she has no legally constituted guardian..... 263

4. A testator by will directed that his estate should be kept together until his daughter married or attained the age of twenty-one, and that in the meantime she, and his three step-children, Ellen, John and Lawrence, should be supported and educated out of the proceeds. Another clause was in the following words: "When my daughter becomes of age, or is married, she is to have my farm," &c. (describing it,) "and one half of my personal estate, money on hand, and claims of every kind due or to be-

come due for money or personal estate; the other half of my personal estate, as just above stated, I wish and direct to be equally divided amongst my three step-children above named, as they respectively become of age, or Ellen may marry with the approbation of her guardian. But in the event that any or all of my step-children shall die before they arrive of age, or Ellen may marry as aforesaid, then the amount herein devised to them or either of them, as may happen, is to be divided as follows," &c. *It was held,*

That the legacies to the step-children did not vest in them absolutely upon the testator's death, but were contingent until the legatees respectively arrived at the age of twenty-one, or Ellen married with the approbation of her guardian; and that, Ellen having married under twenty-one without the approbation of her guardian, the share of one of the step-children who afterwards died, before reaching the age of twenty-one, did not pass to his personal representative..... 268

5. A will contained these clauses: "I also wish that my sister-in-law, S., be considered as one of my heirs, so far as a support, but not as a legal heir to a part of my estate; provided she lives single, and in my family. It is also my wish that my executor shall collect all moneys due me, by note or account, and apply said moneys to the purchase of negroes or stock, for the benefit of my plantation and family. It is also my wish that my family be well supported, in health and sickness, out the proceeds of my plantation and other effects." The testator further directed, that his plantation should be kept up, at the discretion of his executor; that his estate should not be divided, until his oldest child arrived at the age of twenty-one, or married; and that, if his widow married, her legal share of the estate should be set apart and allotted to her. The widow having married again, her share of the estate was allotted to her, and S. afterwards filed a bill against the administrator to enforce the payment of her legacy. *It was held,*

1. That the testator's "family" was not dissolved by the marriage of his widow, but continued to exist *until the time appointed for a final division of the estate;* and that the complainant was entitled to a support out of the estate until that time, unless she forfeited it by her voluntary abandonment of the family, or marriage.
(CHILTON, J., *dissenting*, held, That she was entitled to a support *for life*, unless forfeited by her voluntary act.)
2. That neither the widow and her husband, nor the children were necessary parties to the bill.—Huckabee, Adm'r. v. Swoope..... 492

6. The case of Baker et al. v. Heirs of Chastang, (18 Ala. 417,) touching the right of a married woman in this State to dispose of her real estate by will, and the effect of the probate of such a will, re-affirmed.—Gannard et al. v. Eslava et al..... 732

WITNESS.

1. A witness may, with the consent of the opposite party, state a legal conclusion; and the failure to object to an answer stating such a conclusion amounts to consent—Sterne v. The State..... 43
2. When an accommodation endorser of a note, on which judgment is recovered against him, files his petition for a *supersedeas* of an execution issued thereon, alleging satisfaction of the judgment, and issue is taken upon the

facts set forth in the petition, the party, for whose accommodation he endorsed the note, may be rendered a competent witness for the petitioner by the execution of a release to him by the latter previous to the trial; and it is no objection to the release that it was delivered to the witness by the petitioner's attorney, when it is shown, that after its delivery, the petitioner acknowledged that he had released the witness.—Br. Bank Mobile v. Coleman..... 140

3. The act of 1845, which renders the defendant in execution an incompetent witness on a trial of the right of property, is in derogation of the common law, and extends only to claim suits under the statute.—Zackowski v. Jones..... 189

4. In trespass against the sheriff for attaching plaintiff's goods as the property of his vendor, the vendor is a competent witness for the plaintiff to prove the fairness of the sale to him..... 189

5. When a witness is excluded as incompetent by the primary court, the Appellate Court, in reviewing its decision, can only look to the ground of objection raised in the primary court..... 189

6. On grounds of public policy, an attorney at law may be a witness for his client, when he has no other interest in the event of the suit than such as concerns his fees, and they are not contingent in their nature.—Quarles v. Waldron and Wife..... 217

7. The interest which will disqualify a witness from testifying must be some legal, certain and immediate interest in the result of the suit itself, or in the record thereof as an instrument of evidence to support his own claims, or to protect him from an admitted liability.—Poe, Sheriff, v. Dorrah..... 288

8. The surety on a replevin bond, which has been returned forfeited, is a competent witness for the plaintiff in an action against the sheriff for failing to make the money on the execution..... 288

9. Proof of declarations, verbal or written, made by a witness out of court, is, as a general rule, inadmissible *in corroboration* of testimony given by him on the trial of a cause.—Nichols v. Stewart..... 360

10. The court may, in its discretion, refuse a motion to have a person, who is about the court, but has not been subpœnaed, brought in to testify as a witness in a cause.—Woodward v. Purdy..... 379

11. A partner who executes a note in the name of the partnership, is not a competent witness against his co-partner, when the latter is sued alone on the note.—Barney v. Earle, Ex'r..... 405

12. When an agent, acting within the scope of his authority, executes a promissory note in the name of his principal and himself, he is an incompetent witness against his principal, when the latter is sued alone on the note.... 405

13. When an agent, having authority from his principal to purchase goods from A, purchases from B, and executes a note in the name of his principal and himself jointly, for the purchase money, he is an incompetent witness against his principal, when the latter is sued on the note..... 405

14. A distributee of an estate is *prima facie* an incompetent witness, when his testimony tends to increase the funds of the estate, and the presumption of interest is not removed by proof to the court that the estate had been declared insolvent before the witness was sworn, the party against whom the evidence is offered being neither the personal representative, nor a creditor of the estate.—McGuire v. Shelby..... 456

15. A bankrupt is not a competent witness to testify for his assignee, for the

purpose of increasing the fund in his hands; but when his testimony tends to decrease that fund, he is considered as swearing against his interest, and is competent.—Colgin et al. v. Redman et al. 640

16. The mere fact, that a witness is a party to a suit in chancery, does not render him incompetent. If he has no interest in that part of the litigation about which he is called to testify, or if, being interested, he is examined as to matters which militate against that interest, he is perfectly competent. 640

17. Where a bill is filed by the secured creditors, for the settlement of a deed of trust, the maker of the deed, although he is a defendant to the bill, is a competent witness for one of the complainants, to prove the *bona fides* of his debt and his assent to the deed, it being shown that after the execution of the deed he had obtained his discharge in bankruptcy. 640

18. Orders for the examination of a defendant as a witness for the complainant are made as matters of course, reserving the question of his competency to be made at the hearing; and there is no rule requiring an affidavit to be previously made of his want of interest. 640

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